Applicant Details

First Name	**Chelsea**
Middle Initial	**E**
Last Name	**Sissom**
Citizenship Status	**U. S. Citizen**
Email Address	**chelsea.sissom@temple.edu**
Address	**Address** Street **2109 Spring Garden St, Apt. 1F** City **Philadelphia** State/Territory **Pennsylvania** Zip **19130** Country **United States**
Contact Phone Number	**8062360207**

Applicant Education

BA/BS From	**Texas A&M University-West Texas A&M University**
Date of BA/BS	**May 2010**
JD/LLB From	**Temple University--James E. Beasley School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23905&yr=2011**
Date of JD/LLB	**May 23, 2024**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**Temple Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Epstein, Jules
Jules.Epstein@temple.edu
(215) 204-1856
DeJarnatt, Susan
susan.dejarnatt@temple.edu
215-204-8736
Stephen, Loney
sloney@aclupa.org

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Chelsea E. Sissom

2109 Spring Garden St Unit 1F | Philadelphia, PA 19130 | **(806) 236-0207** | **chelsea.sissom@temple.edu**

June 19, 2023
The Honorable Juan R. Sánchez
United States District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street
Room 14613
Philadelphia, PA 19106

Dear Chief Judge Sánchez:

I am a rising third-year law student at Temple University Beasley School of Law, and I am interested in joining your chambers as a Term Clerk after graduation in 2024. I believe that starting my career in your chambers will offer unparalleled experience that will make me a better lawyer. Working in the Eastern District of Pennsylvania will provide me the invaluable opportunity to learn about the inner workings of the litigation process and to serve our community. As a former teacher, I am passionate about public service, and I am confident that my work ethic, experience, and dedication will be an asset to your chambers.

During my time at Temple, I have excelled in my studies while also serving as a member of Temple's National Trial Team and the Temple Law Review. My grades are a product of both hard work and an ability to learn quickly. I have learned how to research and write efficiently as a research assistant to Professor Laura Little and a legal intern for the ACLU of Pennsylvania. Through those experiences, my writing has ranged from academic essays to internal memoranda and witness examinations for trial. Additionally, as a law clerk for Steve Fairlie, I wrote a criminal appellate brief. My efforts to develop my writing skills have resulted in a transcript notation for Best Paper in Legal Research and Writing and my Law Review Comment's selection for publication in next year's volume of Temple Law Review.

I pride myself on my ability to solve problems and foster positive working relationships. These are skills I learned as an elementary Montessori teacher and have continued to develop as a law student. As a teacher, I had to be adaptable and research and implement varied strategies. My experiences taught me that persistence, creativity, and teamwork can lead to a solution to the most challenging problems. These are skills that will make me an engaged and effective clerk.

I am confident that I have the experience, attributes, and passion necessary to make a valuable contribution as your Term Clerk. Thank you for your time and consideration.

Respectfully,

Chelsea Eryn Sissom

Chelsea Sissom

Chelsea E. Sissom

2109 Spring Garden St Unit 1F | Philadelphia, PA 19130 | **(806) 236-0207** | **chelsea.sissom@temple.edu**

Education

Temple University Beasley School of Law — **Philadelphia, PA**
J.D. Candidate — MAY 2024
GPA: 4.0, Class Rank: Top 5%
Honors: *Temple Law Review*, Volume 96 Note/Comment Editor, 2023-2024
Temple Law Review, Volume 95 Staff Editor, 2022-2023
Beasley Scholar
Best Paper, Legal Research and Writing I and Constitutional Law
Outstanding Oral Advocacy, Legal Research and Writing II
Activities: National Trial Team

University of Central Florida — **Orlando, FL**
Coursework toward Masters of Education — MAY 2013

West Texas A&M University — **Canyon, TX**
Bachelors of General Studies with focuses in biology and dance — MAY 2010
Honors: *Summa Cum Laude*

Legal Experience

Ballard Spahr — **Philadelphia, PA**
Summer Associate — MAY 2023 – AUG. 2023

First Judicial District of Pennsylvania — **Philadelphia, PA**
Judicial Intern for the Honorable Judge Holly Ford — JAN. 2023 – MAY 2023

Temple University Beasley School of Law — **Philadelphia, PA**
Teaching Assistant to Professor Jeffrey Dunoff (Constitutional Law) — JAN. 2023 – MAY 2023
Teaching Assistant to Professor Susan DeJarnatt (Legal Research and Writing) — AUG. 2022 – MAY 2023
Teaching Assistant to Professor Duncan Hollis (International Law) — JAN. 2023 – MAY 2023

ACLU of Pennsylvania — **Philadelphia, PA**
Certified Legal Intern — SEPT. 2022 – JAN. 2023

- Researched novel issues, investigating prospects of litigation, and writing memos
- Interviewed clients, prepared witness examinations for trial, and argued a motion in limine

Fairlie & Lippy, P.C. — **North Wales, PA**
Summer Law Clerk — JUNE 2022 – JAN. 2023

- Researched and wrote memos and briefs for criminal defense cases

Temple University Beasley School of Law — **Philadelphia, PA**
Research Assistant to Professor Laura Little — JUNE 2022 – AUG. 2022

- Researched, analyzed, and updated Supreme Court opinions for a constitutional law textbook
- Wrote essays explaining historical and cultural significance of Supreme Court cases

Other Work Experience

Teaching

- **Bucks County Montessori Charter School** — *4th–6th Grade Teacher* — Aug. 2020 – June 2021
- **Montessori World School** — *1st–6th Grade Lead Teacher* — Aug. 2013 – June 2020
  - Wrote and edited communications and designed and led presentations for the elementary department
  - Supervised interns with communication, planning, and classroom leadership

Animal Training

- **Joel Slaven's Professional Animals** — *Animal Care, Training, and Performing* — Aug. 2020 – June 2021

Student Information

Name
Chelsea E. Sissom

Student Type
Continuing Degree Seeking

Curriculum Information

Current Program : Juris Doctor

Program	College	Major and Department
Law--Full Time	Law, Beasley School	Law--Full Time, Law: Beasley School of Law

Institution Credit

Term : 2021 Fall

College	Major	Student Type
Law, Beasley School	Law--Full Time	First Time Professional

Academic Standing	Last Academic Standing	Additional Standing
Not Calculated	Not Calculated	Dean's List

Term Comments
Semester Notations:
Best Paper (Legal Research & Writing I)
DCP (Contracts)

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R	CEU Contact Hours
JUDO	0402	Main	LW	Civil Procedure I Heath, J	A	4.000	16.00			
JUDO	0406	Main	LW	Contracts Baron, J	A	4.000	16.00			
JUDO	0414	Main	LW	Legal Research & Writing De Jarnatt, S	A	3.000	12.00			
JUDO	0420	Main	LW	Torts Rahdert, M	A	4.000	16.00			
JUDO	0437	Main	LW	Intro to Transactional Skills Monroe, A	S	1.000	0.00			

Term Totals	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	15.000	60.00	4.00
Cumulative	16.000	16.000	16.000	15.000	60.00	4.00

Term : 2022 Spring

College	**Major**	**Student Type**
Law, Beasley School	Law--Full Time	Continuing Degree Seeking

Term Comments
Semester Notations:
OOA (Legal Research & Writing II)
DCP (International Law)
DCP (Criminal Law I)
Tie-BP; DCP (Constitutional Law)

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R	CEU Contact Hours
JUDO	0404	Main	LW	Constitutional Law Dunoff, J	A	4.000	16.00			
JUDO	0410	Main	LW	Criminal Law I Shellenberger, J	A+	3.000	12.00			
JUDO	0414	Main	LW	Legal Research & Writing De Jarnatt, S	A	2.000	8.00			
JUDO	0418	Main	LW	Property Wells, C	A	4.000	16.00			
JUDO	0556	Main	LW	International Law Hollis, D	A	3.000	12.00			

Term Totals	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	16.000	64.00	4.00
Cumulative	32.000	32.000	32.000	31.000	124.00	4.00

Term : 2022 Fall

College	**Major**	**Student Type**
Law, Beasley School	Law--Full Time	Continuing Degree Seeking

Term Comments
Semester Notations:
Barrister Award Winner
(Trial Advocacy I)

Additional Standing
Dean's List

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours
JUDO	0460	Main	LW	Trial Advocacy I Lippy, E	S+	2.000	0.00		
JUDO	0540	Main	LW	Evidence Epstein, J	A+	3.000	12.00		
JUDO	0905	Main	LW	Temple Law Review Reinstein, R	CR	2.000	0.00		
JUDO	0909	Main	LW	National Trial Team Epstein, J	CR	1.000	0.00		
JUDO	1000	Main	LW	Trial Team - Pretrial Motions Epstein, J	S+	1.000	0.00		
JUDO	5001	Main	LW	Equity and Bias in Education Rieser, L	A	3.000	12.00		
JUDO	P420	Main	LW	Practicum: Civil Rights Lippy, E	S+	3.000	0.00		

Term Totals	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Current Term	15.000	15.000	15.000	6.000	24.00	4.00
Cumulative	47.000	47.000	47.000	37.000	148.00	4.00

Term : 2023 Spring

College	Major	Student Type
Law, Beasley School	Law--Full Time	Continuing Degree Seeking

Academic Standing	Last Academic Standing
Not Calculated	Not Calculated

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours
JUDO	0461	Main	LW	Trial Advocacy II - Trial Team Kolb, R	S+	3.000	0.00		
JUDO	0517	Main	LW	Civil Procedure II Jacobsen, K	A	2.000	8.00		
JUDO	0756	Main	LW	State Judicial Clerkship Walden, B	S+	3.000	0.00		
JUDO	0901	Main	LW	Guided Research II Hollis, D	S+	2.000	0.00		
JUDO	0905	Main	LW	Temple Law Review Little, L	CR	1.000	0.00		
JUDO	0909	Main	LW	National Trial Team Epstein, J	CR	1.000	0.00		
JUDO	1001	Main	LW	Trial Team-Evdnc/Stratgy Epstein, J	S+	1.000	0.00		
JUDO	1042	Main	LW	LRW III: Experts in Civil Lit Kolb, R	A	3.000	12.00		

Term Totals	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	5.000	20.00	4.00
Cumulative	63.000	63.000	63.000	42.000	168.00	4.00

Transcript Totals

Transcript Totals - (Law)	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Total Institution	63.000	63.000	63.000	42.000	168.00	4.00
Total Transfer	0.000	0.000	0.000	0.000	0.00	0.00
Overall	63.000	63.000	63.000	42.00	168.00	4.00

Course(s) in Progress

Term : 2023 Fall

College
Law, Beasley School

Major
Law--Full Time

Student Type
Continuing Degree Seeking

Subject	Course	Campus	Level	Title	Credit Hours
JUDO	0416	Main	LW	Professional Responsibility	3.000
JUDO	0547	Main	LW	Introduction to Intellectual Property	3.000
JUDO	0569	Main	LW	Advanced Trial Advocacy (Civil)	3.000
JUDO	0726	Main	LW	Federal Judicial Clerkship	3.000
JUDO	0903	Main	LW	Guided Research II Serial	2.000

June 19, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Please accept this letter as one of the highest endorsements possible for the application of Chelsea Sissom to serve as a clerk in your chambers in the next year. Put simply, it is hard to find a student clerk-applicant who is more intelligent, more capable, and more diligent.

Ms. Sissom was a student in my Evidence class, where she excelled earning the top grade in the class of nearly 100 students. She studies seriously, asks probing questions, and ensures that there is a complete grasp of Evidence rules and concepts at the most complex level.

I know Ms. Sissom in a second context, as a valued member of Temple's National Trial Team. Although a primary focus of trial team membership is on developing and applying advocacy skills, the work also includes legal research, case analysis, Evidence argument, and team work. After tens and tens of hours working with her in this setting, everything I saw confirms what I wrote above – she is at the level of 'best of the best.'

Before recommending anyone for a clerkship I review at least one writing sample. I read Ms. Sissom's law review comment, an exploration of a complex and concerning First Amendment issue in the context of curricular choice in the classroom. I also reviewed her resume, which includes a writing award, her editor role on the Law Review, and her work as a research assistant to Professor Little. All confirm that she is a gifted researcher and writer - articulate, concise, and persuasive where needed and appropriate.

Chelsea Sissom's excellent law school grades and achievements are testaments to and confirm her many strengths. As well, she is exceptionally personable. She knows how to listen, to learn from others, to take the best lessons and build off of them. It is for these reasons that I commend her to you.

I hope this letter proves helpful. Please feel free to contact me with any questions.

Sincerely,
/s/ Jules Epstein
Professor Jules Epstein

Jules Epstein - Jules.Epstein@temple.edu - (215) 204-1856

June 19, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write in enthusiastic support of Chelsea Sissom's application to serve as your law clerk. I cannot recommend Chelsea more highly. She is extremely smart, a terrific researcher and writer, and has an amazing work ethic. Any judge who hires her will feel they hit the jackpot.

I first got to know Chelsea in August 2021 when she started law school and was in my 1L Legal Research and Writing class. Chelsea was the top student in a very good class. She was a thoughtful participant in class discussions and a natural at legal research and analysis. She wrote the best memo in the class in the fall and one of the best in the spring, along with being a standout at oral advocacy. This year she is a staff editor on the Temple Law Review and a member of Temple's very demanding and prestigious National Trial Team. She was recently named a Note and Comment Editor for the Law Review for the upcoming academic year. She has yet to earn a grade other than an A in any course. That is highly unusual for Temple and a real tribute to her intellect and work habits.

I was very happy when Chelsea agreed to be my Teaching Assistant for LRW this year. She has done a terrific job, especially in being able to relate to the anxiety and endless questions that first year law students come up with. I know they really respect and rely on her. She has promptly completed every task I've asked of her, even though she has to juggle the demands of law review, trial team, and being a TA for Professor Jeff Dunoff's Constitutional Law class and Professor Duncan Hollis's International Law class. Few students could manage that schedule with the aplomb, good spirits, and competence Chelsea brings every day.

Chelsea is not only an exceptional student but a true pleasure to work with and a great team player who is respected by her colleagues. All these qualities will enable her to be an outstanding law clerk. In short, I strongly recommend her. I am happy to discuss Chelsea's candidacy further. I am out of the country until June 5 but will respond promptly to email and am happy to talk over Zoom if you would find that helpful. Please let me know.

Sincerely,

Susan L. DeJarnatt

Professor of Law

Susan DeJarnatt - susan.dejarnatt@temple.edu - 215-204-8736

May 15, 2023

Re: Clerkship Recommendation—Chelsea Sissom

To Whom It May Concern:

I am delighted to write in support of Chelsea Sissom's clerkship application. To be clear, in case my writing below does not adequately convey this with the intended force: what follows is meant as an enthusiastic recommendation of a truly excellent candidate. Chelsea has the intelligence, aptitude, maturity, dedication, and training to be an excellent law clerk and attorney. I simply could not recommend a person more highly.

ACLU
AMERICAN CIVIL LIBERTIES UNION
Pennsylvania

Eastern Region Office
PO Box 60173
Philadelphia, PA 19102
215-592-1513 T
267-573-3054 F

Central Region Office
PO Box 11761
Harrisburg, PA 17108
717-238-2258 T
717-236-6895 F

Western Region Office
PO Box 23058
Pittsburgh, PA 15222
412-681-7736 T
412-345-1255 F

I am the Senior Supervising Attorney at the ACLU of Pennsylvania, where Chelsea began as a Legal Department Intern for the fall 2022 term. She quickly established herself such an integral part of the team that we asked her to stay past her planned end date to continue as a member of a trial team for an extra six weeks into 2023.

During her time with the ACLU of Pennsylvania, Chelsea demonstrated legal skills and professionalism far beyond what should be expected from a second-year law student. She worked side-by-side with experienced attorneys on a variety of projects cutting across several complex areas of civil rights law, including First Amendment, students' rights, LGTBQ rights, indigent defense and Sixth Amendment issues, and voting rights. Her research and writing on these projects was stellar and, again, at a level of sophistication that exceeds her years of experience.

Chelsea's talents really shined through as our team prepared for a bench trial in a Sunshine Act case against a Pennsylvania school board. She showed such a mastery of the rules and aptitude for witness examinations that experienced lawyers, including myself, came to rely on her for help structuring our questions in a way that would elicit valuable testimony within the bounds of the rules of evidence. In the process, Chelsea proved to be a strategic thinker who offered creative ideas that advanced our litigation strategy. In one instance, Chelsea suggested and then researched and fleshed out an idea no other team member had considered about a line of questioning, which I ended up implementing as a centerpiece of my cross-examination of our opponent's expert witness. We also asked Chelsea to take the lead on a complicated pretrial evidentiary motion, which she handled beautifully. With the court's approval, Chelsea argued that motion in open court and presented what was probably the best oral argument of anyone who presented in court that day, including our experienced opposing counsel.

I am fully confident based on my experience with Chelsea—and my long history of working with interns, summer associates, and junior litigators—that she will be an asset to any judge's chambers. In between my time as the supervising attorney at the Philadelphia office of the ACLU and my early days in a federal appellate chambers as a law clerk for Judge Van Antwerpen, I spent 16 years practicing at two of the world's largest law firms. Most recently, I was the Philadelphia Litigation Group Managing Partner at Hogan Lovells, where I was also as the Philadelphia Office Hiring Partner and head of the Philadelphia Recruitment Committee. In that time, I have rarely seen a law student who is as prepared as Chelsea is to practice law and handle complex case work. And she comes to this work with a warm disposition and team-mindedness that should enable her to fit seamlessly into virtually any work environment. In all things, Chelsea is enthusiastic, prepared, and consistently willing to go the extra mile to make sure that the work is done right and that everyone on her team shines. I can think of no better set of attributes for a judicial law clerk.

Please feel free to contact me directly if it would be helpful to answer any questions or discuss Chelsea's candidacy.

Best regards,

Stephen A. Loney
Senior Supervising Attorney
ACLU of Pennsylvania
sloney@aclupa.org

Chelsea E. Sissom

2109 Spring Garden St Unit 1F | Philadelphia, PA 19130 **(806) 236-0207** | **chelsea.sissom@temple.edu**

Writing Sample

This brief was produced in Legal Research and Writing II during the Spring 2022 semester. The assignment was to draft a brief in support of the defendant's motion for summary judgment regarding her alleged violation of the Fair Debt Collections Practices Act (FDCPA) resulting from the filing of a lawsuit barred by res judicata.

This 10-page writing sample begins with the "Argument" section. The summary judgment standard has been omitted as well as portions of the argument section that were uncontested. The statement of the case, summary of the argument, and conclusion have also been omitted in this submission to reduce the sample's length. I would be happy to provide the full brief if requested. It is entirely my own work and unedited by anyone else.

ARGUMENT

This Court should grant Ms. Pearlman's motion for summary judgment because even if her act of filing a lawsuit barred by res judicata was a violation of the FDCPA, it was unintentional and the result of a bona fide error. A debt collector may be excused from liability by showing "by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). At the time of filing, Ms. Pearlman believed the debt was legally enforceable, so the alleged violation was unintentional. Pearlman Dep. 1:11-15. Furthermore, Ms. Pearlman maintains reasonable procedures to avoid the error of filing a lawsuit barred by res judicata, including a client agreement that it will only transmit legitimate debts, use of the state court website to search the docket for previous claims, and regular FDCPA training. Pearlman Dep. 3:5, 4:5-12.

1. Defendant is entitled to summary judgment because the alleged violation was the result of an unintentional, bona fide error, and she maintained regular orderly steps to avoid filing a res judicata-barred lawsuit.

Ms. Pearlman is entitled to summary judgment because her unintentional filing of a lawsuit barred by res judicata occurred even though she maintained regular, orderly steps to avoid such a mistake. A bona fide, or good-faith, error is sometimes used to provide a defense to a statute that would "otherwise impose[] strict liability." *Bona Fide Error*, *Black's Law Dictionary* (11th ed. 2019). Congress included the affirmative defense of bona fide error to protect debt collectors who unintentionally violate the FDCPA. "A debt collector may not be held liable . . . if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c).

Ms. Pearlman satisfies the Third Circuit's three-part test, which requires: "(1) the alleged violation was unintentional, (2) the alleged violation resulted from a bona fide error, and (3) the

bona fide error occurred despite procedures designed to avoid such errors." *Beck v. Maximus, Inc.*, 457 F.3d 291, 298 (3d Cir. 2006) (holding a defense specific to a named plaintiff may defeat typicality and adequacy required for class certification). Ms. Pearlman's mistake satisfies all three parts as evidenced by her reliance on her client's agreement to only submit enforceable debts for collection, her prompt withdrawal of the lawsuit upon her notification of its legal status, her use of the Philadelphia Court of Common Pleas docket search to avoid the specific error, and her participation in regular FDCPA training. Pearlman Dep. 4:5-7, 3:4-5, 4:11-12; Pearlman Ans. 2:12.

1.2 Ms. Pearlman satisfies the third element of the bona fide error defense because she had procedures in place reasonably adapted to avoid filing a lawsuit barred by res judicata.

Ms. Pearlman implements and maintains regular, orderly steps reasonably adapted to avoid mistakes, including a client agreement that it will only transmit legitimate debts for collection, use of the court website to locate any previous lawsuits involving the parties, and regular FDCPA training. Pearlman Dep. 3:5, 4:5-12. Thus, she is entitled to summary judgment based on the bona fide error defense outlined in 15 U.S.C. § 1692k(c). The procedures required by the bona fide error defense are "processes that have mechanical or other such 'regular orderly' steps to avoid mistakes." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 587 (2010) (holding bona fide error defense does not apply to violation resulting from debt collector's misinterpretation of law). Ms. Pearlman has an agreement with her client that it will only transmit legitimate debts, and it is the regular practice in Ms. Pearlman's office for her assistant to check the state court website. Pearlman Dep. 3:5, 4:5-7. These are processes with mechanical steps designed to avoid filing erroneous lawsuits. Additionally, she attends FDCPA training every year and subscribes to ACA International, which are regular practices intended to facilitate compliance with the FDCPA. Pearlman Dep. 4:11-12.

Ms. Pearlman's reliance on her client's agreement, the court website, and regular FDCPA training is sufficient to satisfy the reasonableness standard. Section 1692k(c) "does not require debt collectors to take every conceivable precaution to avoid errors; rather, it only requires reasonable precaution." *Kort*, 394 F.3d at 539. "[T]he bona fide error defense doesn't demand perfection . . . ." *Abdollahzadeh v. Mandarich L. Grp., LLP*, 922 F.3d 810, 817 (7th Cir. 2019). In *Abdollahzadeh,* the law firm was sued for violating the FDCPA by sending a letter to collect a time-barred debt. *Id.* at 812. The firm acted based on creditor-provided data that reflected the wrong final payment date. *Id.* The firm's procedures to avoid such FDCPA violations included a practice, with no written policy, of relying on account reports provided by the debt collector to ascertain the last-payment date. *Id.* at 813. The creditor relied on a computer program to eliminate out-of-statute debt, after which an attorney examined the account. *Id.* at 818. This "system for guarding against attempts to collect time-barred debts, while unquestionably simple, qualifies under § 1692k(c) as a regular and orderly error-prevention procedure." *Id.* at 817. Further, even though "[t]hese procedures didn't catch the mistake here," *Abdollahzadeh* found that the law firm's "procedures were reasonably adapted to [prevent attempts to collect time-barred debts], giving it a safe harbor for occasional missteps." *Id.* at 818.

While Ms. Pearlman's procedures of relying on her client agreement, checking the court website, and engaging in regular FDCPA training may be simple, she is still entitled to the bona fide error defense, especially because the error in question is equally simple. Pearlman Dep. 3:5, 4:5-12. "The Supreme Court has focused on the orderliness and regularity of the debt collector's error-prevention steps, not on the number or complexity of those steps." *Abdollahzadeh*, 922 F.3d at 817 (citing *Jerman*, 559 U.S. at 587). Even though Ms. Pearlman's orderly, regular procedures did not prevent the error in this case, they were still reasonably adapted to prevent the filing of a lawsuit barred by res judicata, and she should be given safe harbor for her own occasional unintentional missteps.

1.2.1 Ms. Pearlman reasonably relied on her client's agreement to only transmit files for collection that are legitimate, collectible debts, which is one step she employs to ensure compliance with the FDCPA.

Ms. Pearlman reasonably relied on an agreement with her client that all files it transmits to her for collection are legitimate, collectible debts as one procedure she maintains to avoid filing erroneous lawsuits. Pearlman Dep. 4:5-7. A collector may reasonably rely on a client not to forward invalid accounts, for "the FDCPA does not require collectors to independently verify the validity of the debt to qualify for the 'bona fide error' defense." *Hyman v. Tate*, 362 F.3d 965, 968 (7th Cir. 2004). In *Hyman*, the debt collector relied on an understanding "that the bank would not forward accounts for collection where the debtor had filed for bankruptcy." *Id.* at 966. Nonetheless, it sent a collection letter to a debtor, who responded that she had filed for bankruptcy; subsequently, the defendant closed the account and ceased collection attempts. *Id.*

The Seventh Circuit found the collector "reasonably relied on [the creditor] not to forward accounts" that were not collectible because it would not be good business for the creditor to do so. *Id.* at 967-68. The debtor argued that the lack of a formal agreement made it unreasonable for the defendant to rely on the creditor. *Id.* The debt collector's reliance on the creditor, however, combined with its procedures of implementing FDCPA training and ceasing collection attempts upon learning of a bankruptcy filing, was enough to meet the standard required by the bona fide error defense. *Id.*

Similarly, Ms. Pearlman has an agreement with her client that it will only send her legally collectible debts, which is more than the "understanding" the debt collector had with the bank in *Hyman* and thus more reasonable for Ms. Pearlman to rely on. Pearlman Dep. 4:5-7. Additionally, since it is in Midland's best interest not to transmit legally unenforceable debts to Ms. Pearlman for collection, she was reasonable to rely on their agreement. Like the collector in *Hyman*, Ms. Pearlman promptly withdrew the lawsuit upon learning of her mistake. Pearlman Ans. 2:12. Furthermore, Ms.

Pearlman had no reason to believe Midland wouldn't comply with the agreement, even though Midland may have been sued for FDCPA violations before, especially since she believed those practices were resolved by agreement with the Consumer Finance Protection Bureau. Pearlman Dep. 4:30-31, 5:3-6.

Ms. Pearlman's reliance on her agreement with Midland was reasonable because even though she used the state court docket search to locate any previous lawsuits by her client against the debtor, she was unaware of any information contrary to what her client provided. Where a law firm relies without verification on its client and overlooks readily available contrary information, its procedures are not reasonably adapted to avoid error. *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 948 (9th Cir. 2011). Ms. Pearlman's procedures do not fall victim to this rule because she discovered no contrary information to what her client provided despite her attempt to verify the debt. In *McCollough*, the law firm unreasonably relied on its client where the contract "expressly disclaimed 'the accuracy or validity of data provided,'" and the firm had an electronic file that contested the information the client transmitted regarding the statute of limitations. *Id.* at 949.

Before filing, the firm was aware the debt was time-barred and requested "an instrument in writing to extend the Statute of Limitations" from the debt collector. *Id.* at 945. When the debt collector responded with an email that the statute of limitations was extended, the law firm sought no documentation or verification of the information. *Id.* Ms. Pearlman's procedures are readily distinguished by her agreement with her client that it would only transmit legitimate, collectible debt and her independent attempt to verify the legality of the claim. Pearlman Dep. 4:5-7, 3:4-5. Further, the law firm in *McCollough* was made aware that the information the debt collector provided was incorrect and continued to prosecute the time-barred lawsuit for four months. 637 F.3d at 947. In contrast, Ms. Pearlman promptly withdrew the lawsuit against Ms. Freamon upon learning it was barred by res judicata. Pearlman Ans. 2:12.

Ms. Pearlman's procedures are more analogous to those in *Hyman*, whose "understanding" with the bank was sufficient because it is reasonable to believe a business would comply with the FDCPA, for that is what is in its own best interest. 362 F.3d at 967-68. Ms. Pearlman's procedures are reasonable because she has an agreement with her client to only transmit legitimate, collectible debt, she went further by attempting to independently verify the debt, and she immediately withdrew the lawsuit upon learning of the previous claim. Pearlman Dep. 4:5-7; Pearlman Ans. 2:12. Together, these practices demonstrate Ms. Pearlman reasonably relied on her client agreement as one procedure to avoid filing a lawsuit barred by res judicata.

1.2.2 Ms. Pearlman's reliance on the Philadelphia County Court of Common Pleas docket search engine was a procedure reasonably adapted to avoid the mistake of filing a lawsuit barred by res judicata.

Even though debt collectors are not required to independently validate a debt, Ms. Pearlman does use the Philadelphia Court of Common Pleas online docket search to ensure no lawsuits have previously been filed. Pearlman Dep. 3:5. Reliance on this government resource is reasonable because "[t]he word 'reasonable' in the Fair Debt Collection Practices Act defense cannot be equated to 'state of the art,' which is to say, at the technological frontier." *Ross v. RJM Acquisitions Funding LLC*, 480 F.3d 493, 497-98 (7th Cir. 2007). In *Ross*, the plaintiff incurred a debt under the name Lisa Ross and subsequently filed for bankruptcy under the name Delisa Ross. *Id.* at 496. Due to the different spellings of her name, the debt collector was not aware of her bankruptcy filing and attempted to collect her debt. *Id.* The plaintiff argued the debt collector should have used more advanced search technology to find her name, but the court found that the investment into state-of-the-art technology "would be disproportionate to the slight aggregate harms resulting from the handful of [errors] that modest procedures occasionally let through the sieve." *Id.* at 498.

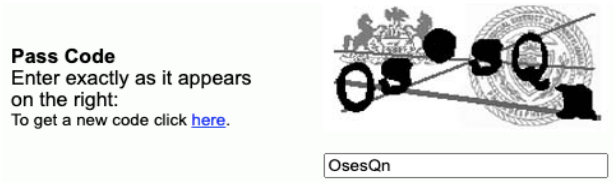
It is similarly reasonable for Ms. Pearlman's practice to use the free Court of Common Pleas docket search because the cost of the other available search engines is disproportionate to the

likelihood of error and the potential harm caused. The bona fide error defense "forgives mistakes, even though they inflict harm, when the cost of avoiding a mistake would be disproportionate to the harm." *Id.* at 496. For instance, it would be unreasonable to require Ms. Pearlman's small practice to maintain a Bloomberg subscription for $500 a month when she can access the same information for free through the court website. Pearlman Dep. 4:16-17. The likelihood of harm is low as well, as shown by the successful use of the court website in a later case, where Mr. Pierce, Ms. Pearlman's assistant who runs the searches, located a previous suit in the docket, allowing Ms. Pearlman to avoid filing a suit barred by res judicata. Pearlman Dep. 3:30-31.

Furthermore, the alleged violation in this case occurred not due to Ms. Pearlman's mistake, but rather due to a clerical spelling error in the court's docket, where the debtor's name was spelled "Freeman" instead of "Freamon." Pierce Dep. 2:22. The bona fide error defense exempts debt collectors with reasonable error-avoidance procedures from liability in the event of clerical errors. *Jerman*, 559 U.S. at 1614-15. A clerical error is one "resulting from a minor mistake," especially "a drafter's or typist's technical error . . . ." *Clerical Error*, *Black's Law Dictionary* (11th ed. 2019). The spelling error in the state court docket is a clear example of a clerical error, resulting from a typist's technical error, and Ms. Pearlman should be protected by the bona fide error defense.

Mr. Pierce, Ms. Pearlman's assistant who conducts the online searches, reasonably searched the state court docket using Ms. Freamon's last name. Pierce Dep. 2:24. This is the only reasonable use of the court website because using the phonetic search feature results in 24,235 cases, and searching for Midland Funding results in 1,977 cases, which would take hours to sort through. Phila. Cts. Civ. Docket Access, https://fjdefile.phila.gov/efsfjd/zk_fjd_public_qry_01.zp_personcase_setup_idx?uid=_puN!mwPxIolqsSYDxam&o=Ht!ZsWohRypzJf9 (check the box for phonetic search and search for last name "Freamon" or company name "Midland Funding") (last visited Feb. 28, 2022).

Moreover, trying to search for variations of "Freamon" is unreasonable because there could be hundreds of spelling configurations, and it would be unreasonable to expect Mr. Pierce to predict whether a spelling error occurred, let alone in precisely what way the name was misspelled. Ms. Pearlman is not required to take "every conceivable precaution," merely those that are reasonable. *Kort*, 394 F.3d at 539. Trying every conceivable spelling configuration or phonetic possibility would go beyond the bounds of reasonable and into the absurd. The time burden involved trying to guess how a court clerk may have misspelled a party's name in every single case Ms. Pearlman is given would far outweigh the possibility of slight harm, particularly because the website requires multiple steps for each search. These steps include entering the party's name and a pass code that is not easy to read; then, to view a case to compare the address or other relevant information, the file must be opened and another pass code entered. Phila. Cts. Civ. Docket Access, *supra*.



Id. Because of this laborious process, to attempt multiple spelling configurations of a name would cost valuable time that would be disproportionate to the slight risk of there being a spelling error in the docket at all.

Even if Mr. Pierce attempted various spelling combinations, it is likely the error still would not have been detected; thus, the search using Ms. Freamon's last name was reasonable. *Ross* noted there are "other types of search algorithm[s] . . . such as phonetic and approximate-string matching algorithms . . . but they probably would not have detected the error" in that case. 480 F.3d at 497. Similarly, if Mr. Pierce tried a variety of misspellings of Ms. Freamon's name or Ms. Pearlman employed the use of a different search engine like Bloomberg, it is entirely possible the error still wouldn't have been detected.

Ms. Pearlman's reliance on the state court website was reasonable because she is not required to subscribe to all "state of the art" search engines; she must merely practice reasonable procedures. *Id.* at 497-98. Moreover, "state of the art" search engines like Bloomberg are not always as up to date as the state court website. For instance, when searching for "Midland Funding" in the Philadelphia Court of Common Pleas docket on Bloomberg, the first result is a case from June 2, 2021, whereas on the state court docket, the most recent case is from February 1, 2022. *Results for Dockets*, Bloomberg L., https://www.bloomberglaw.com/product/blaw/search/results/efd406a1725d89b344c80e0ba6592f7e. (Last visited Feb. 25, 2022). Phila. Cts. Civ. Docket Access, *supra*. Because other sources are not necessarily up to date, they would not have been guaranteed to prevent the error, and Ms. Pearlman's use of the state court docket search was a procedure reasonably adapted to prevent filing a res judicata-barred lawsuit.

Finally, even though the docket's error resulted in the filing of a lawsuit barred by res judicata, Ms. Pearlman withdrew the complaint promptly after learning of the previous lawsuit. Pearlman Dep. 1:11-15. *Ross* observed that according to *Hyman*, two of the four procedures the debt collector employed were enough to be reasonable; these included an understanding that firms would not sell a discharged debt and a policy that the debt collector would stop collection attempts upon notification that a debt had been discharged. *Ross*, 480 F.3d at 497 (citing *Hyman*, 362 F.3d at 968-69). Ms. Pearlman maintained the two qualifying procedures from *Ross* – an agreement with her client to only transmit legally enforceable debts and the immediate withdrawal of erroneous complaints – along with the additional procedures of using the court website to independently verify the debt and participating in annual FDCPA training. Pearlman Dep. 4:5-7, 1:11-15, 3:4-5, 4:11-12. Together, these procedures satisfy the third element of the bona fide error defense.

Applicant Details

First Name	**Melissa**
Middle Initial	**L**
Last Name	**Skarjune**
Citizenship Status	**U. S. Citizen**
Email Address	**melissa.skarjune@duke.edu**
Address	**Address** Street **825 Ivy Meadow Lane, Apt 3D** City **Durham** State/Territory **North Carolina** Zip **27707** Country **United States**
Contact Phone Number	**9728494850**

Applicant Education

BA/BS From	**Cornell University**
Date of BA/BS	**December 2019**
JD/LLB From	**Duke University School of Law** **https://law.duke.edu/career/**
Date of JD/LLB	**May 11, 2024**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Duke Environmental Law & Policy Forum**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Duke Law Hardt Cup Tournament** **The Jeffrey G. Miller National Environmental Law Moot Court Competition (NELMCC)**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hernandez, Sofia
sofia.hernandez@duke.edu
Siegel, Neil S.
Siegel@law.duke.edu
919-613-7157

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Melissa Skarjune
825 Ivy Meadow Lane, #3D
Durham, NC 27707

June 12, 2023

The Honorable Juan R. Sánchez
United States District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106

Dear Chief Judge Sánchez:

I am writing to express my strong interest in clerking for you for the 2024-25 term. I am a rising third-year law student at Duke Law School and expect to receive my J.D. in May of 2024. I will be available to clerk any time after graduation.

While at Duke Law, I have worked diligently to develop my legal research, writing, and oral advocacy skills. Most recently, my moot court team was a semi-finalist in the Jeffrey G. Miller National Environmental Law Moot Court Competition and won best brief for our party. I am also an Executive Editor of the Duke Environmental Law and Policy Forum and am excited by the range of articles I am editing along with the opportunity to collaborate with both Duke Law students and Nicholas School of the Environment students.

Both at Duke Law and prior to law school, I have cultivated strong organizational and time-management skills that will allow me to excel as your clerk. I have experience meeting deadlines while working in fast-paced environments. For example, as a Healthcare Paralegal, I analyzed hundreds of pages of medical records and drafted up to 120 appeals per week to overturn denied medical claims on behalf of healthcare providers. The work involved determining the best argument based on the relevant policy and the facts in the medical record.

Enclosed are copies of my resume, Duke Law transcript, and the appellate brief I wrote for my Legal Analysis, Research, and Writing course. Also enclosed are two letters of recommendation from Professors Neil Siegel and Sofia Hernandez. Please contact me if you need any additional information. Thank you for your consideration.

Sincerely,
Melissa Skarjune

MELISSA SKARJUNE

825 Ivy Meadow Lane, #3D
Durham, NC 27707

Melissa.skarjune@duke.edu
(972) 849-4850

5308 Remington Park Drive
Flower Mound, TX 75028

EDUCATION

Duke University School of Law, Durham, NC
Juris Doctor and Law Certificate in Public Interest & Public Service expected, May 2024
GPA: 3.76
Honors: Moot Court, *Interscholastic Coordinator*; Duke Environmental Law and Policy Forum, *Executive Editor*
Activities: First-Generation Professionals; Innocence Project, *Jail Mail Team Lead*; Environmental Law Society

Cornell University, Ithaca, NY
Bachelor of Science in Biology and Society, *magna cum laude*, December 2019
GPA: 3.82
Study Abroad: CET Academic Programs, Florence, Italy, Spring 2019
Activities: Guiding Eyes for the Blind; Greeks Go Green; Cornell Votes

EXPERIENCE

Department of Justice, Washington, D.C.
Environment and Natural Resources Division Law Clerk, Planned August 2023 – December 2023

Baker Botts, Washington, D.C.
Summer Associate, May 2023 – Present

Nicholas Institute for Energy, Environment, & Sustainability, Durham, NC
Ocean and Coastal Policy Research Assistant, January 2023 – May 2023
- Researched international, national, and subnational public policies on global environmental legal databases to update the Plastics Policy Inventory for the United Nations Development Program (UNDP).
- Evaluated secondary literature for additional public policy documents targeting plastic pollution.
- Contributed to a literature review exploring the intersection between plastic pollution policies and gender.

North Carolina Conservation Network, Raleigh, NC
Stanback Summer Fellowship – Environmental Justice Legal Fellow, May 2022 – July 2022
- Researched 60 provisions in the Infrastructure Investment and Jobs Act (IIJA) in 4 categories of interest.
- Drafted legal memorandum outlining agency authority to direct IIJA investments to underserved communities.
- Identified relevant decision makers and agency programs in North Carolina for new IIJA funding streams.
- Attended weekly advocacy meetings with various stakeholders, including impacted community members.
- Collaborated with policy team members to submit public comment letters for relevant agency proposals.

Healthcare Legal Solutions, LLC, Washington, D.C.
Healthcare Paralegal, February 2020 – June 2021
- Analyzed medical records and applied legislation to submit 120 appeals each week for healthcare providers.
- Researched rapidly changing healthcare laws and insurance policies during COVID-19 pandemic.
- Drafted appeals, including Medicare and authorization denials, resulting in collection rate of 58%.
- Applied proper appeal formats and met filing deadlines for 12 different health insurers and governmental payers.
- Navigated through multiple computer systems (Time Matters, Epic) to investigate insurance claims.

ADDITIONAL INFORMATION

Semi-finalist and winner of Best Brief for our party (BELCO) in the Jeffrey G. Miller National Environmental Law Moot Court Competition (Spring 2023). Contributed to the Transboundary Marine Species at Risk Workshop in Washington, D.C., with published report expected in 2023 (Fall 2022). Interned for Emerson Collective (Summer 2019) and American Sustainable Business Council (Summer 2018). Worked as Student Program Assistant for Cornell Cooperative Extension (September 2017 – December 2019). Interests and hobbies include ecosystem-based management, renewable energy, visiting museums, sketching, and sand volleyball.

DUKE UNIVERSITY - Unofficial Transcript

Name: **Melissa L. Skarjune**
Student ID: **2298547**

6/6/2023

Academic Program History

Program: **Law School**
(*Status: Active in Program*)
Plan: **Law (JD)** *(Primary)*

Beginning of Law School Record

2021 Fall Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	110	CIVIL PROCEDURE	4.500	3.6	GRD
LAW	130	CONTRACTS	4.500	3.6	GRD
LAW	160A	LEGAL ANLY/RESEARCH/WRIT	0.000	CR	CNC
LAW	180	TORTS	4.500	4.1	GRD

Term GPA: 3.766 Term Earned: 13.500

Cum GPA: 3.766 Cum Earned: 13.500

2022 Winter Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	857	LAWYERING/EXECUTIVE BRANCH	0.500	CR	CNC
Course Topic:		**Reserved for 1Ls and LLMs**			

Term GPA: 0.000 Term Earned: 0.500

Cum GPA: 3.766 Cum Earned: 14.000

2022 Spring Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	120	CONSTITUTIONAL LAW	4.500	3.4	GRD
LAW	140	CRIMINAL LAW	4.500	3.3	GRD
LAW	160B	LEGAL ANLY/RESEARCH/WRIT	4.000	3.6	GRD
LAW	170	PROPERTY	4.000	3.7	GRD

Term GPA: 3.491 Term Earned: 17.000

Cum GPA: 3.613 Cum Earned: 31.000

2022 Summer Term 1

Course		Description	Units Earned	Official Grade	Grading Basis
ENVIRON	895	MEM/MF INTERNSHIP/PROJECT	0.000		NOG

Term GPA: 0.000 Term Earned: 0.000

Cum GPA: 3.613 Cum Earned: 31.000

DUKE UNIVERSITY - Unofficial Transcript

Name: **Melissa L. Skarjune** **6/6/2023**
Student ID: **2298547**

2022 Summer Term 2

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	614	JD PROFESSIONAL DEVELOPMENT	0.000	CR	PFI

Term GPA: 0.000 Term Earned: 0.000

Cum GPA: 3.613 Cum Earned: 31.000

2022 Fall Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	235	ENVIRONMENTAL LAW	3.000	4.0	GRD
LAW	240	ETHICS PROF RESPONSIBILITY	3.000	4.0	GRD
LAW	342	FEDERAL COURTS	4.000	4.0	GRD
LAW	368	NATURAL RESOURCES LAW	2.000	4.0	GRD
LAW	628	JD LEGAL WRITING	0.000	-	NOG
Course Topic:		**Track upper-level writing req.**			
LAW	647	US/CANADA MARINE LIFE GOVT RE	3.000	3.8	GRD

Term GPA: 3.960 Term Earned: 15.000

Cum GPA: 3.727 Cum Earned: 46.000

2023 Winter Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	820	DEPOSITION PRACTICE	0.500	CR	CNC
LAW	822	HEARINGS PRACTICE	0.500	CR	CNC

Term GPA: 0.000 Term Earned: 1.000

Cum GPA: 3.727 Cum Earned: 47.000

2023 Spring Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	200	ADMINISTRATIVE LAW	3.000	3.8	GRD
LAW	210	BUSINESS ASSOCIATIONS	4.000	4.2	GRD
LAW	331	PRIVACY LAW AND POLICY	3.000	3.8	GRD
LAW	421	PRE-TRIAL LITIGATION	2.000	3.5	GRD
LAW	640	INDEPENDENT RESEARCH	2.000	3.8	GRD

Term GPA: 3.871 Term Earned: 14.000

Cum GPA: 3.761 Cum Earned: 61.000

2023 Summer Term 2

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	614	JD PROFESSIONAL DEVELOPMENT	0.000		PFI

Term GPA: 0.000 Term Earned: 0.000

DUKE UNIVERSITY - Unofficial Transcript

Name: **Melissa L. Skarjune** **6/6/2023**
Student ID: **2298547**

Cum GPA: 3.761 Cum Earned: 61.000

Law School Career Earned

Cum GPA: 3.761 Cum Earned: 61.000

Grading Policy

Duke Law School uses a slightly modified form of the traditional 4.0 grading scale. The modification permits faculty to recognize especially distinguished performance with grades above a 4.0, but no more than five percent (5%) of the grades in any class may be higher than a 4.0.

Beginning in the 2022-23 academic year, Duke Law will have an enforced maximum median grade of 3.5 in all courses, both required and elective, regardless of enrollment. Grades in all first-year courses must follow a mandatory distribution. Similarly, for all upper-level courses in which at least 50 percent of the final grade is based on student performance on a uniform metric or series of metrics, grades must follow the mandatory distribution. A grade higher than 4.0 is comparable to an "A+" under letter grading systems. A grade of 2.0 or lower will be failing.

Prior to the 2022-23 academic year, Duke Law had an enforced maximum median grade as detailed below in all required doctrinal courses, first-year Legal Analysis, Research, and Writing (LARW) and in upper-level courses with more than ten (10) students. Required doctrinal courses are: Civil Procedure, Constitutional Law, Contracts, Criminal Law, Property, and Torts.

- In all required doctrinal courses, LARW, and upper-level courses with enrollments of fifty (50) or more students, the median grade was 3.3, with a mandatory distribution.
- In upper-level courses with enrollments of ten (10) to forty-nine (49) students, the maximum median grade was 3.5.
- There was no maximum median grade in upper-level courses with fewer than ten (10) students.
- A grade higher than 4.0 is comparable to an "A+" under letter grading systems. A grade of 1.5 or lower was failing.

The Law School does not release class rank.

* For the Spring 2022 semester, the median grade was a 3.5 for upper-level courses with enrollments of 50 or more students, as well as for Property, Business Associations, International Law, and Administrative Law, elective courses in which first-year students were enrolled. These courses were also graded on a mandatory distribution.

Note on Spring 2020: In response to the Covid-19 emergency, Duke adopted a Credit/No Credit policy for Spring 2020 for all courses with one exception. Although the default was also Credit/No Credit for Legal Analysis, Research and Writing, 1L students could elect to opt for a grade in that course. Duke has returned to the grading system described above in Fall 2020.

CITY ATTORNEY
CITY OF DURHAM

Sofia Hernandez
Senior Assistant City Attorney
City Attorney's Office
City of Durham
101 City Hall Plaza
Durham, NC 27701
Phone: 919-560-4158
Sofia.Hernandez@durhamnc.gov

Your Honor:

I write to recommend Melissa Skarjune for a clerkship in your chambers. Melissa is an intelligent and hard-working law student. She is going to be a terrific lawyer, and I think she would be a valuable help to you as a clerk.

In addition to my duties with the City of Durham's Attorney's Office, I have had the honor to serve as a legal writing professor at Duke Law School. I met Melissa when she was my student in Legal Analysis, Research and Writing. LARW is Duke's required, year-long introduction to fundamental lawyering skills. During the year, I work closely with all my students as they complete research and writing assignments of increasing complexity. So, I tend to develop a good appreciation for the quality of both their work and their work habits. With Melissa, I particularly enjoyed our several 1:1 legal writing conferences. It gave me insight into her critical thinking and organized approach to writing.

From the beginning, Melissa was a great student to have in class. She got along well with her classmates. She was always prepared for discussion. I could always count on her to provide concise and clear analysis on caselaw. She is a thorough researcher and turned in well-organized polished papers. She incorporated feedback seamlessly and handled unexpected legal questions with patience.

Melissa does not shy away from intellectual challenges. She pursues opportunities in and outside of the classroom to continue to develop her appellate skills. This semester her moot court team won Best Brief in the Jeffrey Miller National Environmental Law Moot Court Competition.

Please let me know if there is anything else that I can tell you about Melissa. I'd be happy to share more.

Sincerely Yours,

/s/ Sofia Hernandez

Sofia Hernandez
Senior Assistant City Attorney
City Attorney's Office

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Melissa Skarjune

Dear Judge Sanchez:

Melissa Skarjune was one of the very top performers in my Federal Courts class. She is exceedingly sharp, calm, mature, professional, and public-spirited. She will be a great success as a litigator in environmental and natural resources law. I recommend her for a clerkship in your chambers with great enthusiasm.

Melissa enrolled in my Federal Courts class during the Fall 2022 semester. I view Federal Courts as one of the most challenging classes that the Law School offers—and as essential for clerking and litigating. Many Duke Law students shy away from the class because of its intimidating reputation and potentially negative impact on their grade point averages; for example, only twenty-two students enrolled in my course. The class covers difficult subjects: *Marbury* as a federal courts case; congressional control of federal-court jurisdiction; U.S. Supreme Court reform; the justiciability doctrines; the ins and outs of state sovereign immunity; Section 1983 litigation and individual officer immunity; the abstention doctrines; U.S. Supreme Court review of state-court judgments; and federal habeas-corpus review of state-court criminal convictions and sentences.

Melissa was unfailingly prepared when I called on her, and she volunteered to wrestle with some of the difficult questions that I would pose to the class. Outside class, she participated actively during office hours by asking about course materials, including the rationales for absolute and qualified immunity and the cultures of different police departments. We also talked about constitutional law subjects, including the constitutional gender-equality cases that Ruth Bader Ginsburg argued before the Supreme Court (both she and Melissa attended Cornell for college) and the affirmative-action cases currently before the Court. We further discussed the Law and Psychology course that she took at Cornell Law School during her college years with Professor Rachlinski, which inspired her extensive involvement with the Innocence Project at Duke Law School. This work has been just one of her many activities and contributions beyond the classroom.

My Federal Courts class included many of the most talented students in the Law School. So that I could distinguish among them, I wrote a very challenging final exam. Melissa wrote one of the two or three best exams in the class and earned a 4.0 in the course. Very few people earn a 4.0 in Federal Courts during their law school careers.

In addition to possessing serious intellectual horsepower and legal acumen (they are not the same thing), Melissa exudes the professional virtues that I noted at the outset of this letter. She is unflappable, mature, level-headed, and an able interlocutor and conversationalist. She is intellectually curious and cares about issues that matter. She has a serious commitment to public interest work and wants to litigate environmental law cases while remaining broadly interested in many areas of law.

I am thrilled to support Melissa's application for a clerkship in your chambers. Please feel free to contact me if I can be of additional help as you consider her qualifications. I would be delighted to speak with you about her.

Respectfully yours,

Neil S. Siegel
David W. Ichel Professor of Law and Political Science
Associate Dean for Intellectual Life
Director, Duke Law Summer Institute on Law and Policy

Neil S. Siegel - Siegel@law.duke.edu - 919-613-7157

Melissa Skarjune
825 Ivy Meadow Lane, #3D
Durham, NC 27707
(972) 849-4850
Melissa.skarjune@duke.edu

WRITING SAMPLE

I wrote this appellate brief for my Legal Analysis, Research, and Writing course at Duke Law during the spring 2022 semester. In this assignment, we were asked to brief whether, under Federal Rule of Civil Procedure 41(d), attorney's fees are included in "costs" when no statute allows recovery of fees to a prevailing party. For this case, I was instructed to write my brief on behalf of the Plaintiff-Appellant Tray Sparks.

No. 21-25285

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Tray Sparks,

Plaintiff-Appellant,

v.

Carl Sparks Enterprises, Inc. d/b/a Pine Ridge Ski Area,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Montana
Case 7:21–cv–00289
Hon. Chamberlain Haller

APPELLANT'S OPENING BRIEF

Melissa Skarjune

Attorney for Appellant
Tray Sparks

TABLE OF CONTENTS

STATEMENT OF THE ISSUE

Federal Rule of Civil Procedure 41(d) allows a court to award costs of a previously dismissed action to a defendant when a plaintiff voluntarily dismisses a case and then refiles the same or similar claim in another court. Tray Sparks paid $450 in taxable costs under 28 U.S.C. § 1920 after he voluntarily dismissed his claim in the Helena Division. Does Rule 41(d) exclude attorney's fees from "costs" when no statute provides for them?

STATEMENT OF THE CASE

Plaintiff-Appellant Tray Sparks ("Tray") previously sold land to his brother, Defendant-Appellee Carl Sparks Enterprises, Inc. d/b/a Pine Ridge Ski Area ("Enterprises") but reserved an easement through the property to an area ("the High Pasture") where Tray ran cattle every summer. JA17–18. While exploring an opportunity to develop the High Pasture, Tray discovered Enterprises blocked access to the easement. JA18. Tray demanded Enterprises cease and desist from blocking the easement, but Enterprises refused. JA18. On June 4, 2021, Tray brought a nuisance claim and fraud claim, Cause No. 6:21-cv-00187 ("Cause No. 187"), against Enterprises in the United States District Court for the District of Montana, Helena Division. JA9; 16. He sought damages and injunctive relief. JA19.

On June 14, 2021, Enterprises moved to dismiss the complaint. JA21. The court set a temporary injunction hearing for July 26, 2021, and ordered pretrial disclosures of "proposed exhibits, stipulations, witnesses, and deposition excerpts by July 12." JA29. Tray disclosed Kate Albey as an expert who would testify to the harms caused by construction delays on Tray's development. JA22–23. However, while being deposed by Enterprises on July 2, 2021, Ms. Albey admitted she did not have an accounting degree or CPA license. JA23; 26. Enterprises "moved to strike Ms. Albey and exclude her testimony" because she was unqualified. JA23.

On July 23, 2021, Tray filed his Emergency Motion to Extend Pretrial Order Deadlines to remove Ms. Albey as an expert and designate himself to testify about the harms to his property value. JA22–24. Tray withdrew the "expert designation rather than engage in pointless motion practice concerning her lack of qualifications." JA23. That same day, the motion was denied, and Tray filed a notice of dismissal. JA29. Enterprises then filed an answer. JA29.

On August 6, 2021, Tray filed a nuisance claim in the United States District Court for the District of Montana, Butte Division. JA2–6. This action was based on the same nuisance claim from Cause No. 187, but the fraud claim was not alleged. JA11. On August 10, 2021, Enterprises moved for attorney's fees and stay from Cause No. 187. JA9–12. Following Cause No. 187, Tray had paid $450 of all taxable costs under 28 U.S.C. § 1920 which includes "transcripts, copying, and the like." JA30. However, Enterprises requested an award of $42,435 in attorney's fees as "costs" under Rule 41(d). JA11. Enterprises acknowledged that there is no underlying statute that allows recovery of fees to a prevailing party. JA31.

On September 15, 2021, the court granted attorney's fees and stay to Enterprises. JA33. The district court determined that fees are included within "costs" under Rule 41(d). JA32. Tray was required to pay costs within 30 days, or his claim would be dismissed with prejudice. JA32. On October 18, 2021, Enterprises notified the court that Tray did not pay the costs. JA33. The court issued an Order and Final Judgment and dismissed Tray's claim with prejudice on November 1, 2021. JA33. On December 1, 2021, Tray filed a Notice of Appeal. JA34.

STANDARD OF REVIEW

When a district court awards attorney's fees, the decision is reviewed for abuse of discretion. *See Richard S. v. Dep't of Developmental Servs. of State of Cal.*, 317 F.3d 1080, 1085 (9th Cir. 2003). In this analysis, "[f]actual findings underlying the district court's decision

are reviewed for clear error." *Id.* at 1086. "Elements of legal analysis and statutory interpretation … are reviewed de novo." *Id.*

ARGUMENT

I. UNDER RULE 41(D), A COURT MAY NOT AWARD ATTORNEY'S FEES AS PART OF THE COSTS OF DEFENDING A PREVIOUSLY DISMISSED SUIT THAT A PLAINTIFF LATER REFILES.

The term "costs" in Rule 41(d) has a plain meaning that excludes attorney's fees. Because attorney's fees are not "costs" within Rule 41(d), the district court should not have required Tray to pay attorney's fees as "costs" to prevent dismissal of his case.

Rule 41(d) (emphasis added) governs costs of a previously dismissed action:

> If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court: (1) may order the plaintiff to pay all or part of the *costs* of that previous action; and (2) may stay the proceedings until the plaintiff has complied.

Under the American Rule, the prevailing party does not typically collect attorney's fees from the losing party. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). This standard dates to 1796 where the Supreme Court "ruled that the Judiciary itself would not create a general rule, independent of any statute, allowing awards of attorneys' fees in federal courts." *Id.* at 249. There are exceptions to the American Rule, including when a party acts with bad faith or disobeys a court order. *Id.* at 257–59.

This is a case of first impression because the Ninth Circuit has not settled whether attorney's fees are included in "costs." *See Esquivel v. Arau*, 913 F. Supp. 1382, 1389 (C.D. Cal. 1996). Without controlling authority, this Court can turn to other circuits for guidance. *See id.* Other circuits have reached three different conclusions on how to interpret Rule 41(d). *Garza v. Citigroup Inc.*, 881 F.3d 277, 281 (3d Cir. 2018). Some circuits have held that attorney's fees can always be included as "costs." *See Evans v. Safeway Stores, Inc.*, 623 F.2d 121, 122 (8th

Cir. 1980); *Horowitz v. 148 S. Emerson Assocs. LLC*, 888 F.3d 13, 25–26 (2d Cir. 2018). The Sixth Circuit has found that attorney's fees are never included in "costs." *See Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 875 (6th Cir. 2000) (noting that while other courts have awarded attorney's fees as costs under Rule 41(d), they relied on policy justifications and gave "too little weight to its plain language"). Other circuits adopt the hybrid approach where "costs" can include attorney's fees only when statutory authority defines "costs" to include them. *See Esposito v. Piatrowski*, 223 F.3d 497, 501–02 (7th Cir. 2000); *Andrews v. Am.'s Living Ctrs., LLC*, 827 F.3d 306, 309–12 (4th Cir. 2016) (noting that attorney's fees are unavailable "as a matter of right" under Rule 41(d)); *Garza*, 881 F.3d at 282–84; *Portillo v. Cunningham*, 872 F.3d 728, 737–40 (5th Cir. 2017).

Here, "costs" in Rule 41(d) exclude attorney's fees. First, the term "costs" in Rule 41(d) has a plain meaning that confirms attorney's fees are excluded. Second, the terms used in other Federal Rules of Civil Procedure ("Federal Rules") and 28 U.S.C. § 1920 establish that attorney's fees are not "costs" within Rule 41(d). Finally, excluding attorney's fees from "costs" serves the purpose of Rule 41(d) and furthers important policy goals. Therefore, the district court's Order and Final Judgment dismissing the case with prejudice should be reversed.

A. The plain meaning of "costs" in Rule 41(d) confirms that "costs" exclude attorney's fees.

The term "costs" in Rule 41(d) has a plain meaning which limits "costs" from including attorney's fees. When interpreting the Federal Rules, courts "apply the 'traditional tools of statutory construction.'" *Republic of Ecuador v. Mackay*, 742 F.3d 860, 864 (9th Cir. 2014) (quoting *United States v. Petri*, 731 F.3d 833, 839 (9th Cir. 2013)). The first step in interpreting a rule is "to determine whether the language at issue has a plain meaning." *Id.* (quoting *McDonald v. Sun Oil Co.*, 548 F.3d 774, 780 (9th Cir. 2008)).

The legal definition of costs supports the plain meaning that attorney's fees are excluded from "costs" in Rule 41(d). It is common practice to consult dictionaries to determine a term's plain meaning and how it was defined when the text was adopted. *Johnson v. Aljian*, 490 F.3d 778, 780 (9th Cir. 2007). When Rule 41(d) was adopted, "costs" were defined as "[e]xpenses pending suit as allowed or taxed by the court." *Costs*, *Black's Law Dictionary* (3d ed. 1933). None of the definitions listed, including this one, indicate that "costs" always encompass attorney's fees. *See id.* One note adds that attorney's fees are not included in "costs" outright but could be under certain statutory authority. *See id.*

"Costs" and "fees" have different definitions and should not be conflated. Legal terms are usually understood in their familiar legal sense. *See Bradley v. United States*, 410 U.S. 605, 609 (1973). Dictionary notes state that "[c]osts and fees were originally altogether different in their nature." *Costs*, *Black's Law Dictionary* (3d ed. 1933). "Costs" are defined as "the charges or fees taxed by the court, such as filing fees, jury fees, courthouse fees, and reporter fees," *Cost*, *Black's Law Dictionary* (11th ed. 2019), while "attorney's fee" is defined as "the charge to a client for services performed for the client." *Attorney's Fee, Black's Law Dictionary* (11th ed. 2019). "Costs" describes a relationship between the court and a litigant, but "attorney's fee" describes a relationship between an attorney and their client. The different parties involved in each charge establish that "costs" do not encompass attorney's fees categorically.

Interpreting "costs" to exclude attorney's fees is bolstered by the omission of the term "attorney's fees" in Rule 41(d). This Court has stated that "[t]raditional canons of statutory construction suggest that … omission [is] meaningful." *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125 (9th Cir. 2017). The term "costs" is not defined in the text of Rule 41(d) nor in the Advisory Committee Notes. *See* Fed. R. Civ. P. 41 advisory committee's notes. The

term "attorney's fees" is absent from the text of Rule 41(d) and the Advisory Committee Notes. *See id.* When Congress has meant to allow "an award of attorney fees, it has usually stated as much and not left the courts guessing." *See Rogers*, 230 F.3d at 874. It is doubtful that Congress intended to include attorney's fees as "costs" in Rule 41(d) when it did not include the term "attorney's fees" or a definition of "costs." Disregarding the omission of "attorney's fees," while allowing them to be awarded as "costs," would be inserting words absent from the text. *See Rogers*, 230 F.3d at 875–76.

Excluding attorney's fees from "costs" is consistent with other provisions in Rule 41. The court receives "guidance from language used in other provisions of the Rule." *See Briseno*, 844 F.3d at 1125. Rule 41(a)(2) allows for voluntary dismissal by court order "on terms that the court considers proper" when a plaintiff seeks to dismiss after the defendant has answered. While Rule 41(a)(2) has been interpreted to allow an award of attorney's fees, *see Andrews*, 827 F.3d at 311, it uses the word "terms" instead of "costs." Congress uses different terms because it intends for "each term to have a particular, nonsuperfluous meaning." *See Bailey v. United States*, 516 U.S. 137, 146 (1995). If "costs" in Rule 41(d) were meant to award attorney's fees like "terms" in Rule 41(a)(2), then there would be no reason to change language between provisions. Moreover, Rule 41(a)(2) operates later in the litigation process, so it is reasonable that the recovery would be different from Rule 41(d). The two provisions are consistent with each other when applying the plain meaning that "costs" exclude attorney's fees.

It would be inconsistent with the Supreme Court's understanding of the American Rule to include attorney's fees in "costs." The Supreme Court has consistently held that awarding attorney's fees is generally not allowed without statutory authority. *Alyeska*, 421 U.S. at 249–50. An overly broad definition of "costs" that includes attorney's fees would violate the American

rule. *See Portillo*, 872 F.3d at 739 ("Generally permitting fees stretches the meaning of Rule 41(d) too far."). While there are exceptions to the American Rule, "courts are not free to fashion drastic new rules." *Alyeska*, 421 U.S. at 269; *see also F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 131 (1974) (remarking that Congress is aware of the attorney's fees issue and departure from the American Rule is best left for Congress).

Therefore, "costs" in Rule 41(d) has a plain meaning which excludes attorney's fees. Because attorney's fees are not included in "costs," the district court should not have dismissed Tray's claim with prejudice for failure to pay $42,435 in attorney's fees.

B. The terms used in other Federal Rules of Civil Procedure and 28 U.S.C. § 1920 establish that attorney's fees are not costs within Rule 41(d).

The plain meaning of "costs" excluding attorney's fees in Rule 41(d) is supported by Congress's explicit use of the term "attorney's fees" in other Federal Rules and its omission of attorney's fees in 28 U.S.C. § 1920. When interpreting Federal Rules, courts look at "not only the bare meaning of the word but also its placement and purpose in the statutory scheme." *See Bailey*, 516 U.S. at 145. While omission of the term "attorney's fees" is not dispositive, generalized commands are not sufficient to allow an award of fees. *See Key Tronic Corp. v. United States*, 511 U.S. 809, 815 (1994). Compared to other Federal Rules, Rule 41(d) is a generalized command. While Rule 41(d) uses the term "costs," other Federal Rules explicitly use the term "attorney's fees" when they are allowed in recovery. *See* Rule 30(d)(2); Rule 30(g); Rule 37(a)(5)(A)–(B); Rule 37(b)(2)(C); Rule 37(c)(1)(A); Rule 37(d)(3); Rule 37(f); Rule 56(h)). *But see* Rule 54(d)(1) (providing the only example using the qualifying term of "attorney's fees" with "costs"). These Federal Rules demonstrate that Congress "knew how to explicitly define 'costs' to include attorneys' fees, as it had done" with other provisions. *See Garza*, 881 F.3d at 283. The repeated use of the term "attorney's fees" when they are allowed in

recovery demonstrates that the omission of "attorney's fees" from Rule 41(d) was not an oversight.

Context provided by statutory authority reinforces that "costs" exclude attorney's fees. This Court has observed that interpreting a rule requires looking at the context of the rule. *See Mackay*, 742 F.3d at 864. In *Marek v. Chesny*, 473 U.S. 1, 9 (1985), the Court held that in a § 1983 suit, Rule 68 includes attorney's fees as recoverable costs because the underlying statute allowed attorney's fees as costs. Here, there is no statutory authority that allows an award of attorney's fees as "costs." *See* JA31. The underlying statute at issue is § 1920 which lists what courts can tax as "costs," like transcripts and copies, but does not include attorney's fees. *See* 28 U.S.C. § 1920. Courts have interpreted the omission of "attorney's fees" from § 1920 to mean that Congress does not always include attorney's fees in "costs." *See Rogers*, 230 F.3d at 875. Because "costs" are crucial to Rule 41(d), the omission of "attorney's fees" was intentional. *See Marek*, 473 U.S. at 9. Since attorney's fees are not defined as "costs" in § 1920, these fees are not available in Rule 41(d). *See id.* The interplay between Rule 41(d) and § 1920 indicates that this plain meaning is necessary. *See id.*

C. Excluding attorney's fees from "costs" serves the purpose of Rule 41(d) as Congress intended and furthers important policy goals.

The purpose of Rule 41(d) is served by excluding attorney's fees from "costs" and furthers important policy goals. This Court has maintained that interpreting a statute requires looking at the purpose and context. *Mackay*, 742 F.3d at 864. The purpose of Rule 41(d) is to prevent forum shopping and vexatious litigation. *Rogers*, 230 F.3d at 874. Rule 41(d) also serves to prevent the plaintiff from gaining "any tactical advantage by dismissing and refiling th[e] suit." *Id.* (alteration in original) (quoting *Sewell v. Wal–Mart Stores, Inc.,* 137 F.R.D. 28, 29 (D. Kan. 1991)). Courts interpret "language so as to give effect to the intent of Congress."

See United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542–43 (1940) (explaining that the words the legislature selects to express its intent is the most persuasive evidence of a statute's purpose). A court should "presume that a legislature says in a statute what it means and means in a statute what it says." *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992). Congress spoke plainly in how to achieve its purpose by using the term "costs" instead of "attorney's fees." *See Rogers*, 230 F.3d at 874 ("We must assume that Congress was aware of the distinction and was careful with its words."). If Congress wanted to prevent forum shopping and vexatious litigation by awarding attorney's fees, then it would have said so directly. *See id.* at 874–75. Awarding "costs" without attorney's fees serves the purpose of 41(d) as Congress intended.

Even if this Court concludes that the plain meaning of costs in Rule 41(d) allows for attorney's fees under de novo review, the district court still abused its discretion in awarding $42,435 in attorney's fees. While the term "shall" indicates a requirement, the term "may" suggests discretion. *See Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171–72 (2016). Rule 41(d) provides that a court "may order" the payment of costs and "may stay" the proceedings. Thus, Rule 41(d) establishes that an award of costs is discretionary and not mandatory. The district court determined that attorney's fees were included in "costs" but did not find that there was forum shopping or vexatious litigation. *See* JA27–32. The absence of both forum shopping and vexatious litigation weighs against a discretionary award of attorney's fees here.

Excluding attorney's fees from "costs" also furthers the policy choice to have various degrees of deterrence at different litigation stages. Rule 41(a)(2) and Rule 41(d) are distinct in that Rule 41(a)(2) provides recovery after an answer, while Rule 41(d) provides recovery before

an answer. While 41(a)(2) allows awarding attorney's fees, *see Andrews*, 827 F.3d at 311, stronger deterrence is warranted because the defendant has already expended resources answering. Before an answer, the parties have likely used fewer resources, so awarding attorney's fees as deterrence would be excessive. Excluding attorney's fees from "costs" also incentivizes plaintiffs to dismiss as early as possible rather than risk paying attorney's fees under 41(a)(2).

* * *

Here, Tray has already paid $450 in taxable costs under § 1920. Because Rule 41(d) does not include attorney's fees as "costs," the district court should not have dismissed Tray's claim with prejudice for failure to pay attorney's fees.

CONCLUSION

The district court's Order and Final Judgment dismissing the case with prejudice should be reversed.

Date: March 21, 2022

Melissa Skarjune

Attorney for Appellant Tray Sparks

Applicant Details

First Name	**Aysia**
Last Name	**Slade**
Citizenship Status	**U. S. Citizen**
Email Address	**aysia004@gmail.com**
Address	**Address** Street **1001 Evanwood Lane** City **Morrisville** State/Territory **North Carolina** Zip **27560** Country **United States**
Contact Phone Number	**19198087108**

Applicant Education

BA/BS From	**North Carolina State University**
Date of BA/BS	**May 2021**
JD/LLB From	**Duke University School of Law** **https://law.duke.edu/career/**
Date of JD/LLB	**May 21, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/ Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Duke Law Moot Court Board**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just The Beginning Organization**

Recommenders

Garrett, Brandon
bgarrett@law.duke.edu
919-613-7090

Huckerby, Jayne
huckerby@law.duke.edu
919-613-7228

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Aysia Slade
1001 Evanwood Lane
Morrisville, NC, 27560

June 12, 2023

14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106
Courtroom 14-B

Dear Judge Sanchez,

I am writing to express my strong interest in the legal clerkship position for the 2024 term or any term thereafter. As a second-year law student at Duke University School of Law, I have developed the legal writing and research skills required to excel in this role. I am eager to apply them in a challenging and rewarding environment. I am available to clerk for any term after my graduation.

Through internships with the United States Department of Justice Civil Rights Division and the United States Bankruptcy Court Middle District of North Carolina, I gained practical experience in legal research, drafting memoranda, and working collaboratively with case teams to develop effective legal strategies. Because of these experiences, I am very familiar with the government service environment and the skills needed to be an effective member of a judicial chamber.

I have a strong passion for social justice and advocacy for marginalized groups. Prior to law school, I saw clear examples of the devastating impact of the miscarriage of justice on my family and community. As an active member of campus organizations such as the Black Law Students Association, the Innocence Project, and the Wilson Center for Science and Justice, I have continued to develop a passion for the fair and equitable administration of justice. My diverse background and experiences have equipped me with the skills and drive necessary to make meaningful contributions to your team.

I believe that a judicial clerkship is a crucial step in my journey and offers invaluable learning experiences. It would be an honor to join your chambers, your commitment to public service, combined with your reputation for excellence, resonate deeply with me. I have attached my resume and transcripts for your review, and I am happy to provide additional information or answer any questions you may have. Thank you for considering my application.

Sincerely,

Aysia Slade

AYSIA SLADE
1001 Evanwood Lane, Morrisville, NC, 27560 | aysia.slade@duke.edu | 919-808-7108

EDUCATION

Duke University School of Law, Durham, NC
Juris Doctor expected, May 2024
GPA: 3.36
Honors: Mordecai Scholarship – *full tuition for merit;* Mock Trial*;* Moot Court
Activities: Innocence Project, *Board Member;* Black Law Students Association; Movement Lawyering Lab *Integrated Externship with Emancipate NC;* The Appellate Project *Mentee*

North Carolina State University, Raleigh, NC
B.A. in Psychology with Minors in Theatre, Philosophy, and Political Science, *summa cum laude*, May 2021
GPA: 3.8
Honors: University Honors Program; Psychology Honor Society; 2020 Creative Artist Award—*for playwriting;* Excellence in Community Involvement Award
Activities: Alpha Psi Omega Theatre Honor Society, *President*; Kappa Omicron Chapter of Alpha Kappa Alpha Sorority Inc., *Financial Secretary;* Campus Visitors Center, *Campus Ambassador* Black Artist Coalition, *President/Founder*

EXPERIENCE

Weil Gotshal and Manges LLP, Summer Associate *May 2023- Current*
- Participated in due diligence investigations, drafted portions of client documents, and researched relevant legal developments to assist attorneys in firm matters.
- Assisted in creating legal presentations, utilizing visual aids and concise language to communicate complex legal concepts.

United States Department of Justice Civil Rights Division, Intern *January 2023-April 2023*
- Conducted legal research, drafted descriptive statistics, engaged in team discussions, and drafted memoranda as a member of an investigative team
- Collaborated with interns and attorneys on various projects, including research, document review, and writing assignments centered around a variety of civil rights issues.

Wilson Center for Science and Justice, Research Assistant *September 2022- January 2023*
- The Center conducts multidisciplinary research and advocacy focused on accuracy in criminal cases, equity in criminal outcomes, and behavioral health needs.
- Assisted with the development of an advocacy toolkit focused on reforming forensic science practices and an amicus brief on expert evidence for a case before the NC Court of Appeals

United States Bankruptcy Court Middle District of North Carolina, Intern *May 2022- July 2022*
- Handled tasks for the chambers, including reviewing proposed Bankruptcy plans, preparing for hearings, and regularly conferencing with Judge Khan and law clerks.
- Conducted research and drafted memoranda on various issues relevant to the court.

McAngus Goudelock & Courie LLC, Courier *March 2020 – August 2021*
- Provided administrative support for a regional insurance defense firm performing secretarial duties.
- Collaboratively transitioned office to remote work during Covid-19 and adapted to changing responsibilities.

Thriving Youth Lab, Research Assistant *August 2019 – May 2020*
- Mentored at-risk middle school students and helped them identify and achieve individualized goals.
- Attended weekly meetings with lab leaders to learn applied and child psychology and receive feedback.

Black Health Lab, Research Assistant *August – December 2019*
- Supported research on the effects of oppression on the physiological well-being of black Americans
- Managed data for research into the psychological impact of racism in social media on black Americans.

ADDITIONAL INFORMATION

Proficient Spanish Speaker. Experience with SPSS and RStudio. Volunteered with organizations such as InterAct Domestic Violence Shelter, Durham Rescue Mission, Wake County Public School System, and Service Raleigh. Trained vocalist. Playwright. Avid Reader.

DUKE UNIVERSITY - Unofficial Transcript

Name: **Aysia A. Slade**
Student ID: **2393913**

6/7/2023

Academic Program History

Program: **Law School**
(*Status: Active in Program*)
Plan: **Law (JD)** *(Primary)*

Beginning of Law School Record

2021 Fall Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	110	CIVIL PROCEDURE	4.500	3.1	GRD
LAW	130	CONTRACTS	4.500	3.3	GRD
LAW	160A	LEGAL ANLY/RESEARCH/WRIT	0.000	CR	CNC
LAW	180	TORTS	4.500	3.2	GRD

Term GPA: 3.200 Term Earned: 13.500

Cum GPA: 3.200 Cum Earned: 13.500

2022 Spring Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	120	CONSTITUTIONAL LAW	4.500	3.2	GRD
LAW	140	CRIMINAL LAW	4.500	3.3	GRD
LAW	160B	LEGAL ANLY/RESEARCH/WRIT	4.000	3.1	GRD
LAW	170	PROPERTY	4.000	3.5	GRD

Term GPA: 3.273 Term Earned: 17.000

Cum GPA: 3.240 Cum Earned: 30.500

2022 Summer Term 2

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	614	JD PROFESSIONAL DEVELOPMENT	0.000	CR	PFI

Term GPA: 0.000 Term Earned: 0.000

Cum GPA: 3.240 Cum Earned: 30.500

2022 Fall Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	240	ETHICS PROF RESPONSIBILITY	3.000	3.5	GRD
LAW	245	EVIDENCE	4.000	3.4	GRD
LAW	460	NEGOTIATION	3.000	3.5	GRD
LAW	537	HUMAN RIGHTS ADVOCACY	2.000	3.7	GRD
LAW	639	MOVEMENT LAWYERING LAB	3.000	3.7	GRD

Term GPA: 3.540 Term Earned: 15.000

Cum GPA: 3.339 Cum Earned: 45.500

DUKE UNIVERSITY - Unofficial Transcript

Name: **Aysia A. Slade** **6/7/2023**
Student ID: **2393913**

2023 Spring Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	621	EXTERNSHIP	9.000	CR	CNC
LAW	623	EXT. ASSOC. RESEARCH PAPER	2.000	3.8	GRD
LAW	627	EXTERNSHIP RESEARCH TUTORIAL	1.000	CR	CNC

Term GPA: 3.800 Term Earned: 12.000

Cum GPA: 3.358 Cum Earned: 57.500

2023 Summer Term 2

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	614	JD PROFESSIONAL DEVELOPMENT	0.000		PFI

Term GPA: 0.000 Term Earned: 0.000

Cum GPA: 3.358 Cum Earned: 57.500

Law School Career Earned

Cum GPA: 3.358 Cum Earned: 57.500

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Aysia Slade

Dear Judge Sanchez:

I write to recommend Aysia Slade for a judicial clerkship in your chambers. Aysia has a strong record at Duke Law. Aysia arrived as a Mordecai Scholar, which is an enormous honor and privilege, and has been highly active in mock trial, moot court, pro bono work, an internship at the Department of Justice, and more. Aysia would be a delight to work with in chambers and I recommend Aysia strongly.

I first came to know Aysia in my evidence course in fall 2022. Aysia had a very good exam and received a 3.4 grade in a very competitive class. Aysia was easily one of the most engaged students in a quite large course. Aysia was clearly very engaged with specialized issues regarding scientific evidence and lethal ethics during the course. Aysia is also, as the class participation showed, a truly superlative communicator, public speaker and advocate. Aysia reached the semi-finals in the extremely competitive Hardt Cup Competition and serves on the moot court board at Duke Law.

Aysia has done a range of of other impressive research and public interest work at Duke Law, including with the Wilson Center for Science and Justice, which I founded and direct. At the Center, Aysia did excellent work with me, editing and drafting sections of a toolkit designed to explain forensic evidence and regulation of crime laboratories to a general audience. Aysia was a pleasure to work with, was diligent, asked excellent questions, promptly followed up on assignments, and writes extremely well. Aysia also did excellent work with others at the Center, including on an amicus brief filed in the North Carolina Court of Appeals also relating to forensic evidence.

Most recently, I have been supervising independent research that Aysia is conducting on the connections between police investigations and forensic evidence. Aysia is creatively exploring the questions surrounding cognitive bias, and ways in which evidence collection can affect the work of forensic crime analysts. This is an area involving cutting edge psychological research, but not, so far, much engagement or awareness by legal scholars or practitioners. Aysia has developed a thoughtful review of the literature and has just begun a paper informed by that research. I am impressed by Aysia's approach in carefully reviewing these complex literatures and developing an exciting research and writing plan.

Aysia has taken on a variety of perspectives and experiences. During law school, Aysia has interned in bankruptcy court, drafting memos and often on tight time deadlines; conducted investigations for our Innocence Project; and is currently externing in the Civil Rights Division of the U.S. Department of Justice. Aysia has volunteered and engaged in a range of pro bono work as noted. This summer, Aysia is working at Weil Godshall. Aysia is an academically strong student, a quick study, diligent, a strong writer, and a very warm and personable communicator. Aysia is balanced, collegial, creative, hardworking, and would be a great asset in Chambers. Please feel free to contact me at (919) 613-7090 if you would like to discuss Aysia's application, and I thank you for considering it.

Very truly yours,

Brandon L. Garrett
L. Neil Williams, Jr. Professor of Law and
Director, Wilson Center for Science and Justice

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Aysia Slade

Dear Judge Sanchez:

I write this unreservedly supportive letter of recommendation on behalf of Aysia Slade, a member of the Duke University School of Law J.D. class of 2024, who has applied for a clerkship in your chambers. I am a Clinical Professor of Law at Duke University Law School, where I teach the International Human Rights Clinic, Advanced International Human Rights Clinic, and Human Rights Advocacy. I had the pleasure of having Ms. Slade in my Human Rights Advocacy seminar in Fall 2022 and I would very much hope to have her in one of my clinical courses in her final year at Duke Law.

Ms. Slade is an impeccable law student, possessing intellectual depth and genuine curiosity, strong leadership qualities, and a demonstrated excellence in oral and written advocacy. These competencies are on display across a range of her curricular and extracurricular endeavors. From a curricular perspective, Ms. Slade simply excelled in my Human Rights Advocacy class, among a particularly strong cohort of students that included 3L and LL.M students. Her paper for that seminar was an ambitious one. It explored how to apply the international human rights law framework on the right to a remedy—a difficult but important area of international human rights law—to address legacies of slavery in the United States. The paper presented original and incisive legal analysis to *inter alia* explore local reparations schemes in the United States and to propose solutions that were anchored in law but mindful of relevant policy implications. The paper was marked for the extent to which it engaged with primary materials to assess policies and law reform proposals against international legal norms, developing sophisticated substantive arguments in a relatively unchartered area of scholarship. Throughout the drafting of the paper, she was extremely responsive to feedback, while showing great initiative in developing her argument.

Ms. Slade is also the rare type of student whose comments in class were uniformly and genuinely transformative for the seminar. She was always extremely prepared, thoughtful, and articulate, but she was also often able to see the more nuanced side of a topic in ways that you can only dream of as an instructor. Her level of insight was such that it often prompted myself and my colleagues to re-examine our own ideas on the topic at hand. The conversations in a class on international human rights law and advocacy are invariably difficult ones; the fact that she was able to lead these with such aplomb is a testament to the depth of her understanding of the topics, her ability to meaningfully listen to and constructively engage with her peers, her steady sense of self in presenting original perspectives on topics, and the caliber of her communication skills.

This impressive range of skills—in research, writing, and other forms of communication, and analysis—are further evidenced in her other curricular and extracurricular roles at the Law School. Notably, Ms. Slade has acquired practical legal experience through her integrated externship and lawyering lab. She has also honed her fact-finding skills through her leadership in the Innocence Project. That she performs an array of research (e.g., with the Wilson Center) and leadership roles (e.g., as a mentee) in the Law School speaks to her intellectual curiosity on different subject matters and her ability to both collaborate with, as well as lead, her peers. I am very confident that she would effectively apply these competencies developed in her curricular and extracurricular activities to address a wide range of complex legal issues that she would encounter as a judicial law clerk.

Ms. Slade is very bright, focused, thoughtful, an original thinker, and an excellent communicator. I once again recommend her for a clerkship in your chambers without reservation and am happy to be reached with any questions you may have regarding her candidacy.

Sincerely yours,

Jayne C. Huckerby
Clinical Professor of Law

Jayne Huckerby - huckerby@law.duke.edu - 919-613-7228

NO. COA22-1064 TWENTY-SEVEN-B DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cleveland County
	)	20 CRS 72, 50345
ROBERT LEE PRICE	)	

BRIEF OF AMICI CURIAE

****

This is a portion of a brief of amici curiae for a case presented to the NC Court of Appeals, written during my time as a research assistant for the Wilson Center for Science and Justice. Sections written by other Wilson Center members were ommited.

SUMMARY OF ARGUMENT

ARGUMENT

I. The Use of Surrogate Forensic Evidence Expert Witnesses Violates the Confrontation Clause of the 6th Amendment.

The Confrontation Clause of the Sixth Amendment is a bedrock constitutional guarantee, providing that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. XI; see *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (finding the Confrontation Clause applies to both state and federal prosecutions). *Crawford* acknowledges that the admission of testimonial statements at trial from a witness who did not testify is a violation of the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 61 (2004). *Crawford* is essential in recognizing the procedural guarantee of the Sixth Amendment, "not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination," *Id.* at 61. Therefore, it is crucial that witnesses are brought forth to give the testimony is their own rather than serving as surrogates to present the opinions of a non-testifying expert—preventing the defendant from confronting the *actual* witness against them. *See Bullcoming v. New Mexico*, 564 U.S. 647 (2011).

Expert witnesses are often a crucial part of the criminal trial process, providing specialized knowledge for the trier of fact that is necessary to accurately evaluate relevant evidence. When expert witnesses create reports to serve as evidence in criminal proceedings, the reports are testimonial and therefore subject to the confrontation requirements of the Sixth Amendment. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). In the context of expert testimony, Confrontation clause issues typically arise when—as in the present case—prosecutors

attempt to admit reports created by a non-testifying expert witness through the testimony of another witness who was not actually involved in the original analysis. Allowing for surrogate[1] witnesses—those merely "parrot" the opinions of non-present experts—creates a crucial Confrontation Clause violation by ridding the defendant of their right to address the actual expert who developed the opinion presented. *State v. Ortiz-Zape*, S.E.2d 156, 162 (N.C. 2013). "The [Confrontation] Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." *Bullcoming*, 564 U.S. at 662.

The importance of expert witnesses in the forensic evidence context has also been established through significant Supreme Court precedent, which has upheld the confrontation requirement. *Bullcoming*, 564 U.S. 647. The Court has rejected arguments which suggest that forensic evidence is uniquely reliable or neutral due to its scientific nature and subsequently not bound by Confrontation requirements. *Melendez-Diaz,* 557 U.S. at 318. Cross examination is necessary so that defendants can address fraudulent or incompetent actions taken by the forensic experts who gather the evidence against them.

A. The Forensic Evidence Context Requires Heightened Considerations

Forensic evidence collection and analysis play an increasingly important role in the criminal justice system but are hardly "immune from the risk of manipulation." Id.. While the

[1] In this brief, "surrogate" will be used to refer to witnesses who present testimony that lacks independence and solely parrots the analysis and opinions of an absent expert. Terminology used in cases addressing this issue tends to vary slightly—the two most common terms, "substitute" or "surrogate," are used in slightly different ways. In the seminal case Bullcoming v. New Mexico, petitioners argued their witness was an adequate "substitute"; the Court rejected this argument and held that "surrogate" testimony violates the Confrontation Clause. 564 U.S. 647, 661–62 (2011). In State v. Ortiz-Zape, the North Carolina Supreme Court explained an expert "must present an independent opinion obtained through his or her own analysis and not merely 'surrogate testimony' parroting otherwise inadmissible statements." 367 N.C. 1, 9 (2013). The variation in terminology suggests that "substitute" witnesses may be permissible, whereas "surrogate" testimony violates the Confrontation Clause. *See, e.g.,* State v. Baker, 2004 N.C. App. LEXIS 462, 7 (2004) (upholding the use of a "substitute" witness after the analyst who produced the reports retired).

goal of forensic evidence collection is neutral and accurate analysis, there is plenty of evidence that this is not always the case. *See, e.g.,* National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (2009) (revealing the numerous deficiencies within the forensic science field from biased analysis, incompetence, and unscientific methods and misconduct). A 2009 study of overturned criminal convictions shows that invalid forensic testimony contributed to convictions in 60% of the cases. Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 12 (2009). The reliability issues make it even more pertinent that proper weight is given to defendant's right to confrontation.

The Court has recognized that forensic science methodology is open to human error and that accuracy of a report often relies on the actions of the interpreter. *Melendez-Diaz,* 557 U.S. at 321. In the context of forensic analysis, the issue of surrogate testimony often arises when the state seeks to introduce evidence from lab reports or certifications through an expert witness who was not involved in conducting the analysis or developing the report. *See, e.g.*, *Bullcoming*, 564 U.S. 647 (blood alcohol report was testimonial, and admission through testimony of a different witness at trial was an error). The use of surrogate analysts hinders the ability of the jury to correctly analyze the credibility of the analyst. Confrontation provides the necessary opportunity for defendants to scrutinize the processes taken by the analyst in order to avoid the aforementioned pitfalls. Ridding the defendant of the right to confront the actual witness against them (i.e., the analyst who developed the opinion) creates significant reliability risks that are only exacerbated in the context of forensic analysis. There is significant precedent prohibiting the use of surrogate experts in the forensic evidence context. See, e.g., Melendez-Diaz, 557 U.S. 305 (forensic lab reports are testimonial, and therefore subject to Confrontation Clause

requirements); *State v. Ortiz-Zape*, S.E.2d 156, 162 (2013); *State v. Craven*, 744 S.E.2d 458 (N.C. 2013).

Notably, *Melendez-Diaz* highlights some concerns with the methodology in the present case (gas spectrometer and color test for drug identification) these tests rely on the subjective judgment of the analyst creating a risk of error that can be explored through cross examination. Id. (citing 2 P. Giannelli & E. Imwinkelried, Scientific Evidence § 23.03[c] (, pp 532d ed. 2007)). Even assuming gas spectrometer methodology is precise, the Supreme Court has recognized that even incredibly automated or precise scientific analysis requires a degree of interpretation, and the defendant must have the ability to confront the actual interpreter. *Id.* Even experts who are familiar with the tests or processes used by the absent analyst cannot act as substitute witnesses. *Bullcoming*, 564 U.S. at 662-63. In *Bullcoming*, the prosecution argued the witness could act as a substitute because they "qualified as an expert witness with respect to the gas chromatograph machine and the . . . laboratory procedures." *Id.* at 649. The Court recognized that even given the witness's knowledge of the tests performed, the witness would not be able to "expose any lapses or lies on the certifying analyst's part." *Id.* at 662. Therefore, even expert witnesses who are familiar with the tests that were done or possess sufficient specialized knowledge in their own right cannot testify on the results of scientific analysis that they did not personally observe or perform. In *State v. Brent*, the Supreme Court of North Carolina recognized one exception to this rule, finding "machine-generated raw data, if of a type reasonably relied upon by experts in the field, may be admitted to show the basis of an expert's opinion." *State v. Brent*, 367 N.C. 73, 77 (2013).

II. Surrogate Expert Witnesses Lack Independence and Therefore Violate Rule 703 of NC Rules of Evidence

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

N.C. R. Evid. 703.

A. Origins and Intent of N.C. R. Evid. 703

Federal Rule of Evidence 703 aims to balance excluding hearsay evidence while allowing an expert witness to base their opinion on evidence that may not otherwise be admissible. Fed. R. Evid. 703 advisory committee's notes to 2000 amendments. Before the Federal Rules of Evidence were drafted and adapted by the states, common law limited the bases of expert testimony to (1) personal knowledge of the expert or (2) assumed facts—typically presented to the expert in the form of a hypothetical question—if those assumed facts were supported by the record. *Williams*, 567 U.S. at 67-68. This approach required attorneys to guide witnesses to assume the truth of certain facts to answer hypotheticals. *Id*. at 67. Fed. R. Evid. 703 has developed as a way for experts to broaden the basis for expert opinions to match the considerations experts use in regular practice outside of court. Essentially, Fed. R. Evid. 703 allows expert opinions to be based on hearsay so long as the information used as the basis of the opinion is reasonably relied on by the expert is reasonably reliable in their field.

While experts are permitted to analyze data they did not personally develop, the substitute expert must nonetheless testify to their *independent* opinion. *State v. Crumitie*, 266 N.C. App. 373, 379, 831 S.E.2d 592, 596 (2019). A testifying witness may rely on the testing or analysis conducted by another analyst if: (i) that information is of a type "reasonably relied on by experts in the field" in forming their opinions; and (ii) the testifying witness actually used that information and reached their own independent conclusion in this case. *Id*. Further, the

official comment recognizes three possible sources for forming an independent opinion: (i) personal observation; (ii) presentation at trial through a hypothetical question or by having the expert attend the trial to hear testimony and render an opinion; or (iii) presentation of data to the expert outside of court. Thus, simply restating the original analyst's conclusions and opinions, as the expert did in the case at hand, does not suffice as an independent opinion. *See Craven*, 744 S.E.2d 458.

b. The Current Standard for An Independent Opinion

In North Carolina, an expert's independent opinion must be obtained through one's own analysis and not merely provide "surrogate testimony," based solely on otherwise inadmissible statements. *State v. Ortiz-Zape*, 367 N.C. 1 (2013). Yet, in the context of forensic analysts, North Carolina case law is somewhat conflicted as to what exactly constitutes an independent opinion. Generally, courts require some level of support from the record that the witness engaged in an independent analysis. *State v. Crumitie*, 266 N.C. App. 373, 379 (2019). Substitute testimony is permissible, however, if based upon the witness' "own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts' tests, and her own expert opinion based on a comparison of the original data." *State v. Mobley*, 684 S.E.2d 508, 511 (N.C. Ct. App. 2009); *see also State v. Hartley*, 212 N.C. App. 1 (2011)(finding there was no error where a medical examiner testified in place of the pathologist who performed autopsies because the medical examiner witness performed her own analysis, reached her own conclusions, and made minimal references to the pathologist's autopsy reports in her testimony). *State v. Craven* provides an example of unacceptable surrogate testimony: "It is clear from this testimony that Agent Schell did not offer—or even purport to offer—her own independent analysis or

opinion on the 3 March and 6 March 2008 samples. Instead, Agent Schell merely parroted Agent Shoopman's and Agent Allcox's conclusions from their lab reports." *Craven*, 744 S.E.2d 458. Contrarily, in *Ortiz-Zape* independence was established through the witness stating on direct examination that she completed a "peer review" and affirmed that she developed her own independent testimony; even though her answers on cross examination suggested quite the opposite. Ortiz-Zape, 367 N.C. at 12.

As noted by Justice Hudson in her dissent in *Ortiz-Zape*, allowing a weak bar for establishing an "independent opinion" allows Rule 703 and Confrontation Clause concerns to be bypassed by an expert claiming "[their] opinion was "independent," when the record shows manifestly that it was not." Since *Ortiz-Zape*, it has been increasingly common for the North Carolina Supreme Court and the Court of Appeals to find no error in substitute analyst inquiries so long as the testifying analyst merely dictates that their opinion was independent—typically after a "peer review" of the original report. *See, e.g.*, *State v. Brewington*, 367 N.C. 29 (2013) (testifying witness gave opinion formed based on her own analysis, based on testing done by a prior analyst); *see also State v. Barnes*, 226 N.C. App. 318 (2013) (medical examiner's opinion relied on blood toxicology report prepared by another analyst). It is essential that some level of support from the record be provided in order to establish the independence needed to satisfy Rule 703 and the Confrontation clause and maintain the standards from Supreme Court precedent. Otherwise, the court risks creating a simple loophole to Confrontation Clause and Rule 703 protections that risk critical defendants' 6th Amendment rights.

III. Allowing non-independent Surrogate Witnesses to Present Expert Opinions Raises Significant Ethical and Public Policy Concerns

A. Surrogate witnesses are inherently biased and unable to meaningfully testify to crucial information concerning the reliability of the evidence presented.

B. Expert Witnesses Have a Demonstrably Biasing Impact on Jurors.

IV. Conclusion

**********—OMITTED—**********

Applicant Details

First Name	**Emily**
Last Name	**Small**
Citizenship Status	**U. S. Citizen**
Email Address	**es2724a@american.edu**
Address	**Address** Street **1424 Belmont Street NW, Apt 4** City **Washington** State/Territory **District of Columbia** Zip **20009** Country **United States**
Contact Phone Number	**8478732780**

Applicant Education

BA/BS From	**University of Michigan-Ann Arbor**
Date of BA/BS	**April 2018**
JD/LLB From	**American University, Washington College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=50901&yr=2010**
Date of JD/LLB	**May 20, 2024**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**American University Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Beske, Elizabeth
beske@wcl.american.edu
202-274-4302
Hamilton, Rebecca
hamilton@wcl.american.edu
202-274-4241
Speier, Jackie
jackiespeier2007@gmail.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Emily Small

Washington, D.C. | 847-873-2780 | es2724a@american.edu

The Honorable Juan Sánchez
United States District Court, Eastern District of Pennsylvania
601 Market Street
Philadelphia, Pennsylvania 19106

Dear Chief Judge Sánchez

I am a rising 3L at American University Washington College of Law writing to apply to be your law clerk for the 2024-2025 year. I believe that with my prior work and internship experience, my excellent research and writing skills, and my ability to work quickly and efficiently, I would excel at this position.

During my two prior judicial internships, I developed the skills necessary to be an exceptional law clerk. Last summer, I sharpened my legal research and writing skills while working for Judge Natasha Abel at the Equal Employment Opportunity Commission. While there, I drafted orders and responses to motions for summary judgment and participated in hearings. Judge Abel also trusted me to handle a particularly complex Title VII case on my own. For this case, I evaluated the parties' briefs, researched all the case law, analyzed the relevant statutes using the facts in our case, and drafted the response to the parties' motions for summary judgment. Through this opportunity, I mastered a particular area of law and learned to write in my Judge's unique voice.

This past fall I interned with Judge Patricia Millett at the Court of Appeals for the D.C. Circuit, where I further honed my legal research and writing skills. During this experience, I conducted legal research and prepared memoranda relating to upcoming cases, summarized and analyzed draft opinions, and participated in case discussions. I was often asked to research complex and novel legal issues while working efficiently to meet deadlines. On more than one occasion, my research led to a crucial case that the law clerks had not found. Additionally, in one instance, I acted as the sole law clerk for the Judge for a moot court competition. I prepared her bench memo, researched the relevant case law, and prepared questions for the Judge. I really enjoyed this opportunity to take on the role of a law clerk, work closely with the Judge, and gain knowledge about a complicated area of the law of which I was originally unfamiliar.

Additionally, my time working on Capitol Hill taught me how to meet tight deadlines while producing high-quality work. While working for Congresswoman Jackie Speier, I researched and evaluated legislative proposals, wrote memoranda about the proposals for the Congresswoman, and wrote letters regarding the proposals to the Congresswoman's constituents. Through these assignments, I developed my research skills and perfected succinctly analyzing dense pieces of legislation and effectively communicating them to a wide range of audiences. I also learned to be comfortable and effective working in a fast-paced, demanding environment, handling multiple legislative projects while also overseeing the interns in the office, answering constituent phone calls, and solving any administrative problems that unexpectedly arose.

I have further proven my ability to work effectively in a demanding environment while at law school. I have successfully balanced multiple teacher's assistant positions, a judicial internship, and law review assignments all while maintaining a 4.0 G.P.A.

I have included my resume, transcript, writing sample, and letters of recommendation for your review. I believe that with the skill set I have cultivated in law school, on the Hill and through my judicial internships, I am an excellent candidate for this position. Thank you for your time and consideration.

Respectfully,
Emily Small

Emily Small

Washington, D.C. | 847-873-2780 | es2724a@american.edu

EDUCATION

American University Washington College of Law, Washington, D.C. May 2024
Juris Doctor Candidate | GPA 4.0 (Top 5%)
Journal: American University Law Review, *Senior Staffer*
Publication: Comment, *Beyond Duress: Supporting the Admissibility of Evidence of Battered Women's Syndrome to Aid the Defenses of Battered Mothers Charged with Failing to Protect Their Children Against Their Common Abuser*, Am. U. L. Rev. F. (Forthcoming 2023)
Honors: *Highest Grade Designations* in Legal Rhetoric: Writing and Research (Fall 2021); Torts (Fall 2021); Contracts (Fall 2021); Public Law (Spring 2022); Federal Courts (Spring 2023)
Awards: Dean's Merit Scholarship
Positions: *Teaching Assistant* in Civil Procedure (Fall 2022); Criminal Law (Spring 2023); Legal Rhetoric (Dean's Fellow – Fall 2022, Spring 2023)
Activities: Women's Law Association, *Member*; If/When/How, *Member*

University of Michigan, Ann Arbor, MI May 2018
Bachelor of Arts, Women's Studies and Psychology

EXPERIENCE

Covington & Burling LLP, Washington, D.C.
Summer Associate May 2023 – July 2023

United States Court of Appeals for the District of Columbia Circuit, Washington, D.C.
Judicial Extern for the Honorable Judge Patricia Millett August 2022 – November 2022
- Conducted legal research and prepared legal memoranda, summarized and analyzed draft opinions, and participated in case discussions with the Judge and law clerks

Equal Employment Opportunity Commission, Washington, D.C.
Judicial Intern for Administrative Judge Natasha Abel May 2022 – August 2022
- Conducted research and drafted legal memoranda detailing research and case law relating to Title VII, and ADA compliance for the Administrative Judge
- Drafted notices of intent, orders, and responses to motions for summary judgment
- Evaluated litigant's briefs
- Participated in hearings and settlement conferences

Office of Representative Jackie Speier (D-CA), Washington, D.C.
Press Assistant March 2020 – June 2021
- Drafted press releases and social media posts related to the Congresswoman's legislative priorities and committee work in the House Armed Services Committee, House Committee on Oversight and Reform and the House Permanent Select Committee on Intelligence.
- Coordinated press requests in support of the Director of Communications

Staff Assistant March 2019 – June 2021
- Managed the Congresswoman's animal welfare and arts and humanities legislative portfolios, including researching legislative proposals, meeting with advocacy groups, and drafting memoranda
- Handled key responsibilities relating to the women's rights legislative portfolio, including coordinating hearings for the Democratic Women's Caucus related to sexual harassment in the workplace, analyzing legislative proposals, and meeting with advocacy groups
- Drafted statements, formal correspondence, and constituent correspondence

ADDITIONAL INFORMATION

Interests: Reading novels and memoirs, playing pickleball, and watching college basketball

SMALL EMILY B 5212724 10/06

06/06/23 1 OF 1

FALL 2021

LAW-501	CIVIL PROCEDURE	04.00	A	16.00
LAW-504	CONTRACTS	04.00	A	16.00
LAW-516	LEGAL RESEARCH & WRITING I	02.00	A	08.00
LAW-522	TORTS	04.00	A	16.00

LAW SEM SUM: 14.00HRS ATT 14.00HRS ERND 56.00QP 4.00GPA

SPRING 2022

LAW-503	CONSTITUTIONAL LAW	04.00	A	16.00
LAW-507	CRIMINAL LAW	03.00	A	12.00
LAW-517	LEGAL RESEARCH & WRITING II	02.00	A	08.00
LAW-518	PROPERTY	04.00	A	16.00
LAW-652	PUBLIC LAW	02.00	A	08.00

LAW SEM SUM: 15.00HRS ATT 15.00HRS ERND 60.00QP 4.00GPA

FALL 2022

LAW-508	CRIMINAL PROCEDURE I	03.00	A	12.00
LAW-633	EVIDENCE	04.00	A	16.00
LAW-769	SUPERVISED EXTERNSHIP SEMINAR			
	EXTERNSHIP SEMINAR	02.00	A	08.00
LAW-796F	LAW REVIEW I	02.00	--	--.--
LAW-899	EXTERNSHIP FIELDWORK	03.00	P	00.00

LAW SEM SUM: 14.00HRS ATT 12.00HRS ERND 36.00QP 4.00GPA

SPRING 2023

LAW-550	LEGAL ETHICS	02.00	A	08.00
LAW-601	ADMINISTRATIVE LAW	03.00	A	12.00
LAW-643	FEDERAL COURTS	04.00	A	16.00
LAW-691	SEX-BASED DISCRIMINATION	03.00	A	12.00
LAW-719A	HLTHLAW:LEGISLA&REG PROCESS	02.00	A	08.00

LAW SEM SUM: 14.00HRS ATT 14.00HRS ERND 56.00QP 4.00GPA

FALL 2023

LAW-611	BUSINESS ASSOCIATIONS	04.00	--	--.--
LAW-637	DOMESTIC VIOLENCE	03.00	--	--.--
LAW-707A	THE SUPREME COURT	02.00	--	--.--
LAW-797F	LAW REVIEW II	01.00	--	--.--
LAW-834	PUBLIC HEALTH LAW & POLICY	02.00	--	--.--
LAW-933	CIVIL RIGHTS AND REMEDIES	03.00	--	--.--

LAW CUM SUM: 57.00HRS ATT 55.00HRS ERND 208.00QP 4.00GPA

END OF TRANSCRIPT

June 06, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

With tremendous, heartfelt enthusiasm, I recommend my student and Civil Procedure teaching assistant, Emily Small, for a judicial clerkship in your chambers. Emily is the best of the best at our law school. With her 4.0 GPA, she is at the top of her class. This spring, she received the Highest Grade Designation in my Federal Courts class. She also received Highest Grade Designations in Contracts, Torts, and Legal Rhetoric. She is the recipient of the school's most selective merit-based scholarship. She is senior staffer on the American University Law Review, and her comment will be published in the American University Law Review forum. Emily is a beautiful writer, a brilliant thinker, and a wonderful person. *In fifteen years of teaching, during which I have worked intensively with over a thousand law students, I have not had a better student.*

In her first year, I taught Emily in Civil Procedure. I had a daily deliverable assignment, graded only for completion, on which I gave personalized feedback. Smart students quickly realized this was a resource, and Emily gave it her all with every submission. Because of this, I had ample opportunity to read Emily's writing and interact with her personally. I pride myself on very high standards, and Emily consistently hit it out of the park. She is a beautiful writer and a clear thinker. She can take apart a problem from various angles and has the analytical skills necessary to answer the most nuanced legal questions. On the strength of her performance in my class, I jumped at the opportunity to hire Emily from amongst many applicants to be one of my teaching assistants in her 2L year. I was delighted by her performance last semester. Emily is discreet, responsible, mature, and smart. She anticipated what I needed and got it to me before I articulated that need. She was a real asset in communicating difficult concepts to the anxious 1L students who swarmed her office hours. She has fantastic judgment.

This past semester, I taught Emily in a 67-student section of Federal Courts. I used the Hart & Wechsler textbook and really challenged my students. The class has a well-deserved reputation of being one of the hardest at our law school, and it attracts many stellar students. In this group, Emily was a clear standout. All semester long, her nuanced questions in class and in office hours made clear that she was grasping the material at the very highest level. It was no surprise when I had the "big reveal" after grading all the anonymized exams and found that it was Emily's exam at the very top, five points higher than the next-highest student. She's really that good.

Emily is also a lovely person. She is level-headed and kind. Despite her obvious ability, she has utmost humility. She isn't a gunner and she doesn't have sharp elbows. Quite the contrary, she is someone who has made great friends among her peers.

As a two-time law clerk myself (Judge Patricia Wald on the D.C. Circuit in 1993-1994 and Justice Sandra Day O'Connor in 1994-1995), I know that the judicial workload can be extremely intense and that you need a clerk capable of high performance under pressure. I know that you want someone who is mature and responsible, someone you trust implicitly to do excellent work. Emily is that person. *If I were a judge, I would hire her in a heartbeat.*

Please do not hesitate to contact me should you desire any additional information. My cell phone number is 301-518-6872, and I'd be very happy to sing Emily's praises.

Very sincerely,

Elizabeth Earle Beske

Associate Professor of Law

Elizabeth Beske - beske@wcl.american.edu - 202-274-4302

AMERICAN UNIVERSITY
WASHINGTON, DC

Rebecca Hamilton
Professor of Law

Tel: 202-274-4241
Hamilton@wcl.american.edu

May 17, 2023

To Whom It May Concern

It is my great honor to recommend Emily Small for a clerkship in your chambers. Emily stands out as one of the top five students I have encountered in the past decade of teaching and her application comes with my highest level of recommendation.

I was Emily's professor in Criminal Law in spring 2022, where she received a grade of A (top five percent). This grade was based on class participation, weekly assignments, a multiple choice midterm exam, and an essay-based final exam. Even within the compressed timeframe of the final exam, Emily delivered material that was well written, carefully supported, and clearly organized. As you will see from her transcript, producing this level of quality in her coursework is Emily's norm; she has a 4.0 GPA, and has received highest grade designations across an impressive array of subject areas.

Following her outstanding performance in Criminal Law, I hired Emily as my Teaching Assistant for Criminal Law this spring. I hired her for this position not only because of her outstanding academic performance, but also because of what I had seen of her outside the classroom.

Emily is a member of our flagship journal, The American University Law Review (indeed she already has a publication forthcoming). She is a student leader on campus in the realm of gender justice, and an active member of the Women's Law Association. As my Teaching Assistant, she has exceeded the high expectations that I had of her. My current students look up to her as a trusted mentor. She holds weekly office hours and my confidence in her ability to both help students with the substantive issues in Criminal Law, as well as to guide them through the anxieties of the first year of law school, has proven well founded.

WASHINGTON COLLEGE OF LAW
4300 NEBRASKA AVENUE, NW WASHINGTON, DC 20016
http://www.wcl.american.edu

AMERICAN UNIVERSITY
WASHINGTON, DC

Based on all of these interactions, I am confident that Emily has an extraordinary career ahead of her, and I highly recommend her for your clerkship. Please do not hesitate to contact me with any questions about Emily's application. You can reach me on 202 271 4241.

Yours Sincerely

Rebecca Hamilton

WASHINGTON COLLEGE OF LAW
4300 NEBRASKA AVENUE, NW WASHINGTON, DC 20016
http://www.wcl.american.edu

June 06, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am pleased to recommend Emily Small to be a law clerk in your chambers. Emily worked for me for three years in my Washington, DC office and has my enthusiastic endorsement for this next opportunity. I believe Emily's passion for learning, persuasive writing skills, and strong work ethic would make her an invaluable addition to your chambers.

Emily began as an intern in my Washington, D.C. Office and eventually was promoted to Staff Assistant (SA)/Press Assistant (PA). From the start, Emily impressed the team with her ability to learn quickly and showed initiative by improving the efficiency of a number of office procedures.

As my Staff Assistant, Emily was often the first person constituents interacted with and she did it effectively by providing outstanding service. She also managed the internship program and was an outstanding mentor to aspiring congressional staffers. The pace of a congressional office can be challenging, but Emily always exuded a sense of calm while juggling her many responsibilities. No matter how stressful the situation was, I never doubted her ability to get the job done.

As my staff assistant, one of Emily's main responsibilities was working with my Legislative Correspondent (LC) to draft letters in response to constituent concerns. My office would receive thousands of messages monthly and topics ranged from niche local issues to complex policy discussions. She did an excellent job researching the issues and explaining my positions effectively. She is a very good communicator.

Emily went above and beyond the staff assistant duties, always providing quality work. She never hesitated to take on new assignments.

Emily also worked closely with my Legislative Director (LD) on issues relating to the Democratic Women's Caucus, of which I was a Co-Chair. I know Emily has long shared my passion for helping women and families and her commitment to the cause really shined in her work with the caucus. She and my LD planned executed hearings highlighting the insidious nature of sexual harassment in the workplace. The hearings were a success and effectively highlighted the struggles women are still facing to be treated with dignity and respect.

As she advanced in the office, Emily was given an additional role as my Press Assistant. She worked closely with our Communications Director to draft talking points, social media posts, press releases, and speeches. She never blinked. For example, in one situation, the Communications and Legislative Directors were unable to come to work on the day of a major press conference. Normally, I'd be forced to cancel the event, but Emily stepped up to the plate. She set up the press conference, which included organizing my speaking materials, liaising with the press, coordinating with other offices, and livestreaming the event. She was the most junior member of my team, but she handily managed one of the senior-level responsibilities in my office.

During her three years, Emily never lost sight of the mission. Her passion for her work and helping others was never more apparent than during the COVID-19 pandemic. When stay-at-home orders required staff to work remotely, Emily became the sole link between my constituents and my Capitol office. Her empathy during one of the most stressful moments in recent history was vital to acknowledging and quelling my constituents' anxieties and fears. I am confident Emily will bring the same attention to detail and care that she brought to all her interactions with my constituents to any future endeavor.

I recently retired from Congress after 40 years of public service. Outstanding leaders like Emily make me feel hopeful about our nation's future. She has the passion for learning and the necessary drive to succeed as your law clerk.

Put simply, I highly recommend her.

Sincerely,
Jackie Speier

Emily Small

Washington, D.C. | 847-873-2780 | es2724a@american.edu

Attached is a nine-page portion of an appellate brief I wrote for my Legal Rhetoric: Research and Writing course at American University Washington College of Law. The subject of the brief is the Federal Tort Claims Act. To reduce the length of the document, I have omitted the Statement of Jurisdiction, Statement of the Case, and the Summary of the Argument. The writing is entirely my own.

The following are relevant facts: Harold Hawkins hired an attorney, Vernon Pollard, to handle his claim under the Federal Tort Claims Act (FTCA). Mr. Pollard was on a cruise in 2020 that was unexpectedly placed into mandatory quarantine due to the COVID-19 outbreak. This caused him to be unable to fly home as scheduled. During this time, Mr. Pollard was required to remain in his cabin with no internet connection. Additionally, he was only allowed three phone calls that lasted for three minutes each on every fourth day of quarantine. Each time he called his daughter. When the quarantine was lifted, Mr. Pollard flew home on the first available flight and filed Mr. Hawkins's claim the next day. The district court granted summary judgment for the United States and dismissed the case because Mr. Hawkins' claim was not filed within the FTCA's statute of limitations and did not meet the requisite requirements for equitable tolling. This case takes place within the jurisdiction of the imaginary Twelfth circuit.

[sample begins on the next page]

STATEMENT OF THE ISSUES

I. Under the Federal Tort Claims Act, did the District Court err in granting a Motion for Summary Judgment when Mr. Hawkins diligently pursued his rights by hiring his lawyer within the statute of limitations and had no reason to believe his lawyer was ineffective?

II. Under the Federal Tort Claims Act, did extraordinary circumstances impede Mr. Hawkins' filing when his lawyer was quarantined on a cruise ship for ten days and could not file the claim within the required statute of limitations?

ARGUMENT

STANDARD OF REVIEW

Appellate courts review summary judgment motions de novo. *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1190 (10th Cir. 2000). Summary judgment is permissible only if the admissible evidence shows that there is "no genuine issue as to any material fact" and thus the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c).

I. The Summary Judgment Motion granted by the District Court should be reversed and remanded because Mr. Hawkins' situation clearly allows for equitable tolling.

To successfully bring a claim against the United States under the FTCA the plaintiff must submit an administrative tort claim to the appropriate agency within two years of accruing their cause of action. 28 U.S.C. § 2401(b). However, in 2015, the Supreme Court stated that the FTCA's statute of limitations is subject to equitable tolling. *United States v. Kwai Fun Wong*, 575 U.S. 402, 412 (2015). To determine whether equitable tolling applies in a particular FTCA case, the Twelfth Circuit employs the Supreme Court's test established in *Holland v. Florida*. 560 U.S. 631, 649 (2010). The *Holland* test requires that the litigant asserting a claim for equitable tolling establish two elements: 1) the plaintiff has been pursuing his rights diligently, and 2) some extraordinary circumstance prevented timely filing. *Id.* The Record clearly

demonstrates that Harold Hawkins pursued his rights diligently and extraordinary circumstance prevented his timely filing. R. at 17 (Stip. ¶¶ 1, 4); R. at 18 (Stip. ¶¶ 7, 8, 9, 10, 11); R. at 19 (Stip. ¶ 17).

A. Harold Hawkins pursued his rights diligently because he took steps to investigate his FTCA claim within the statute of limitations, and his lawyer never demonstrated ineffective assistance with his claim.

A person pursues his rights diligently when he takes steps to investigate the claim within the statute of limitations and takes action to replace a lawyer who has demonstrated ineffective assistance with his claim. *See Berdiev v. Garland*, 13 F.4th 1125, 1130 (10th Cir. 2021); *Reid v. United States*, 626 F. App'x 766, 769 (10th Cir. 2015); *Bradley v. NCAA*, 249 F. Supp. 3d. 149, 163 (D.D.C. 2017).

To pursue one's rights diligently, that person must take steps to investigate his claim within the statute of limitations. The court in *Boland v. United States* held that the plaintiff did not pursue her rights diligently when it took at least nine years to establish her claim. 827 F. App'x 336, 337 (4th Cir. 2020) *aff'g* No. 2:18-cv-00113-MSDLRL, 2019 U.S. Dist. LEXIS 229943, at * 17 (E.D. Va. Dec. 11, 2019). Similarly, in *D.J.S.-W. v. United States* the court held that the plaintiff did not diligently pursue her rights when she and her lawyer failed to investigate and find easily discoverable information regarding her doctor's employment status. 962 F.3d 745, 753 (3rd Cir. 2020); *see Farhat v. United States*, No. CIV-19-401-SPS, 2021 U.S. Dist. LEXIS 190474, at *9, *11 (E.D. Okla. Sep. 27, 2001) (holding that diligent research would have easily revealed the existence of a claim within the required statute of limitations); *Bamba v. Fenton*, 758 F. App'x 8, 9 (2nd Cir. 2018) (holding that plaintiff was not diligent by failing to further investigate her claim within 90 days of receiving her right-to-sue letter).

However, the court in *Reid* reversed the district court's ruling of summary judgment and held that the plaintiff pursued his rights diligently when he took steps to investigate his FTCA claim by doing legal research and completing necessary forms within the statute of limitations. 626 F. App'x at 769. The court explained that people often file late in limitations periods, and the plaintiff's choice to begin his investigation late in the allotted period does not indicate a lack of diligently pursuing one's rights. *Id.* Additionally, the court in *Bradley* held that the plaintiff did diligently pursue her rights, despite not meeting the statute of limitations, because she retained medical experts, conducted research, and used reasonable effort in researching and attempting to identify her doctor's employer. 249 F. Supp. 3d. at 163.

For a person to diligently pursue his rights he must also take action to replace a lawyer who has demonstrated ineffective assistance handling his claim. The court in *Berdiev* held that the plaintiff did not pursue his rights diligently when he did not seek out new counsel for three years, despite his lawyer consistently ignoring his calls and requests for information about the case. 13 F.4th at 1130. Similarly, the court in *Esteban-Marcos v. Barr* held that the plaintiff did not pursue her rights diligently when she disapproved of her lawyer's lack of communication and the way he handled her claim, but she did not acquire new counsel for seven years. 821 F. App'x 919, 923 (10th Cir. 2020); *see also Small v. Collins*, 10 F.4th 117, 146 (2nd Cir. 2021) (holding that plaintiff did not do diligently pursue his rights when his lawyer abandoned him, but he did not retain a new attorney within the remaining five months of the statute of limitations).

Conversely, in *Holland*, the Supreme Court held that the plaintiff did pursue his rights diligently when, as soon as he realized he could never get into contact with his court-appointed attorney, he repeatedly requested a new attorney. 560 U.S. at 640. Similarly, the court in *Doe v. Busby* held that the plaintiff pursued his rights diligently when the plaintiff had no reason to

believe his lawyer would not file the petition on time. 661 F.3d 1001, 1013 (9th Cir. 2011). The court emphasized that, without any indication that his lawyer was ineffective, it was reasonable for the plaintiff to assume that his lawyer was going to meet the required deadlines. *Id.* at 1015.

Mr. Hawkins' pursued his rights diligently because he took steps to investigate his FTCA claim within the statute of limitations, and Mr. Pollard never demonstrated ineffective assistance with his claim. Unlike the plaintiffs in *Boland*, *D.J.S.-W.* and *Farhat* who did not do any research or conduct any investigation, and failed to recognize that they had a FTCA claim until after the statute of limitations expired, Mr. Hawkins hired Mr. Pollard four months prior to his statute of limitations deadline specifically because he wanted someone to handle his FTCA claim. *Boland*, 827 F. App'x at 337 (plaintiff failed to discover claim until at least nine years after the malpractice incident); *D.J.S-W*, 962 F.3d at 753 (plaintiff's lawyer did not discover doctor was a federal employee); *Farhat*, 2021 U.S. Dist. LEXIS 190474, at *11 (plaintiff failed to realize he had a claim until after the statute of limitations); R. at 17 (Stip. ¶ 1).

The United States might argue that Mr. Hawkins did not diligently pursue his rights because he waited to hire Mr. Pollard until four months prior to the statute of limitations. However, Mr. Hawkins' timing mirrors the timing in *Reid* where the plaintiff was still diligent even though he did not commence any action until nineteen months into his twenty-four-month statute of limitations period. R. at 17 (Stip. ¶ 1); *Reid*, 626 F. App'x at 769. Following *Reid*, the mere fact that Mr. Hawkins did not hire a lawyer until four months prior to the deadline is not a sufficient basis for a granting of summary judgment. 626 F. App'x at 769.

Additionally, unlike the plaintiffs in *Berdiev*, *Esteban-Marcos*, *Small*, and *Holland* there was no indication that Mr. Pollard demonstrated ineffective assistance with Mr. Hawkins' claim. *Berdiev*, 13 F.4th at 1130 (lawyer consistently ignored plaintiff's calls and requests for

information); *Esteban-Marcos*, 821 F. App'x at 919 (plaintiff knew the lawyer was taking her case in a unfavorable direction); *Small*, 10 F.4th at 146 (plaintiff's lawyer abandoned him); *Holland*, 560 U.S. at 649 (plaintiff's lawyer ignored him). In fact, Mr. Pollard was well-equipped to handle Mr. Hawkins' claim. Mr. Pollard practiced law in Utah since 2002 and handled nearly a dozen FTCA matters. R. at 17 (Stip. ¶ 4). Like the plaintiff in *Doe*, Mr. Hawkins had no reason to doubt Mr. Pollard's ability to be an effective attorney. R. at 17 (Stip. ¶ 4), *Doe*, 661 F.3d at 1013.

Harold Hawkins took steps to investigate his FTCA claim within the statute of limitations, and Mr. Pollard never demonstrated ineffective assistance with his claim. Thus, Mr. Hawkins pursued his rights diligently.

B. Mr. Hawkins demonstrated that extraordinary circumstances prevented timely filing because the quarantine that kept his lawyer from filing his claim was both unforeseeable and beyond both his and his lawyer's control.

A person demonstrates that extraordinary circumstances impede timely filing when the circumstances in question are unforeseeable and beyond the control of the plaintiff and their lawyer. *See Menominee Indian Tribe v. United States*, 577 U.S. 250, 252 (2016) *Boland*, 827 F. App'x at 341, *D.J.S.-W.*, 962 F.3d at 745; *Joseph v. United States*, 505 F. Supp. 3d 977, 981 (N.D. Cal. 2020).

Courts have consistently held that circumstances that are widespread, or common in ordinary life and within the confines of the legal system, do not meet the threshold of being "extraordinary." *Menominee*, 577 U.S. at 252 (holding that litigation costs and limited financial resources are not extraordinary); *see Sweesy v. Sun Life Assurance. Co.*, 643 F. App'x 785, 797 (10th Cir. 2016) (holding that plaintiff's claim of missing her filing deadline due to the death of her elderly and ill father was not extraordinary); *Cook v. United States*, No. 16-CV-555-JED-JFJ,

2019 U.S. Dist. LEXIS 166259, at *9 (N.D. Okla. Sep. 27, 2019) (holding that a plaintiff's financial constraints and difficulty finding an expert witness were not extraordinary); *Watson v. United States*, 865 F.3d 123, 132 (2nd Cir. 2017) (holding that lack of education, pro se status, or ignorance of the right to bring a claim are not extraordinary).

Conversely, extraordinary circumstances did occur when the unprecedented COVID-19 pandemic disrupted plaintiffs' ability to manage their claims. *See Joseph*, 505 F. Supp. 3d at 977 (finding it extraordinary when the COVID-19 pandemic stay-at-home orders made it extremely difficult for plaintiff to find a lawyer within the statute of limitations); *Johnson v. Rewerts*, No. 2:20-CV-12165, 2021 U.S. Dist. LEXIS 173635, at *1, *3 (E.D. Mich. Sep. 14, 2021) (holding that prison lockdowns and law library shutdowns implemented to combat COVID-19 were extraordinary circumstances that impeded timely filing). Similarly, the court in *Dunn v. Baca* held that the COVID-19 pandemic was an extraordinary circumstance because lawyers, who are otherwise acting diligently, may be forced to miss their deadlines due to technical difficulties arising from teleworking, and the sudden need for lawyers to care for their children. No. 3:19-cv-00702-MMD-WGC, 2020 U.S. Dist. LEXIS 86453, at *4 (D. Nev. May 18, 2020).

For a court to find that extraordinary circumstances impeded timely filing of an administrative claim, the circumstances must also be beyond the control of the plaintiff or their lawyer. *See Barnes v. United States*, 776 F.3d 1134, 1151 (10th Cir. 2015) (holding that plaintiffs were not entitled to equitable tolling when they gave no explanation for filing late); *Menominee Indian Tribe*, 577 U.S. at 250; *D.J.S-W*, 962 F.3d at 753 (holding that a lawyer's inability to determine that defendant was a federal employee was not extraordinary because the information was discoverable through reasonable means of investigation). In *DeLia v. U.S. Department of Justice*, the court held that while COVID-19 is beyond a plaintiff's control it was

not justified as an extraordinary circumstance when the plaintiff failed to demonstrate how the pandemic prevented him from contacting the court, whose clerk's office continued normal operations. No. 21-5047, 2021 U.S. App. LEXIS 28311, at *10 (10th Cir. Sep. 20, 2021). Additionally, the *Small* court held that even when circumstances are beyond a plaintiff's control, if they have time to remedy the situation, the circumstances are not extraordinary. 10 F.4th at 121 (finding a lawyer's abandonment of her client was not extraordinary when the plaintiff had five months to hire new counsel and file the claim); *see Flud v. United States ex rel. Dep't of Veteran Affairs*, 23 F. Supp. 3d 1352, 1357 (N.D. Okla. 2014) (holding that plaintiff's choice not to consult a lawyer about his misdiagnosed claim was in his control and not an extraordinary circumstance); *Boland*, 827 F. App'x at 337 (holding that plaintiff's own decision caused the delay in litigation, and was not extraordinary); *Sigala v. Bravo*, 656 F.3d 1125, 1128 (10th Cir. 2011) (finding no extraordinary circumstances when counsel never informed plaintiff of an amended judgment because plaintiff never proactively contacted his defense counsel or the court).

Conversely, in *Holland* the Supreme Court found extraordinary circumstances when, despite the plaintiff doing everything in his power to communicate with his lawyer, his lawyer would not respond. 560 U.S. at 649. Similarly, in *Maples v. Thomas* the Supreme Court held that when the plaintiff was abandoned by his attorney at a critical moment, and was unaware that he was unrepresented, the circumstances were extraordinary. 565 U.S. 266, 289 (2012). Courts have also found extraordinary circumstances when administrative processes beyond the plaintiff's control delay their complaint. *See Bradley*, 249 F. Supp. 3d at 149 (finding an extraordinary circumstance when plaintiff could not ascertain her doctor's employer because the connection between the doctor and the federal government was contractually and purposefully concealed);

Kwai Fun Wong v. Beebe, 732 F.3d 1030, 1053 (9th Cir. 2013) (finding extraordinary circumstances when delays within the court's system caused plaintiff to miss her deadline).

In Mr. Hawkins' case, a court would find that the COVID-19 mandated quarantine on Mr. Pollard's cruise ship was an extraordinary circumstance because it was unforeseeable, and entirely out of Mr. Hawkins' and Mr. Pollard's control. Unlike the circumstances in *Menominee Indian Tribe*, *Cook*, *Watson*, and *Sweesy*, mandatory quarantine is not a regular occurrence or something that occurs often in daily life. *Menominee*, 577 U.S. at 252 (significant costs to litigation are not extraordinary); *Cook*, 2019 U.S. Dist. LEXIS 166259, at *3 (financial constraints are not extraordinary); *Watson*, 865 F.3d at 123 (lack of education is not extraordinary); *Sweesy*, 643 F. App'x at 797 (death of father with Alzheimer's not extraordinary); R. at 18 (Stip. ¶¶ 6,7,8,9).

Mr. Pollard's situation is similar to the situation in *Joseph* where the court emphasized that the "current restrictions on civil and personal life" due to the COVID-19 public health crisis were an extraordinary circumstance. 505 F. Supp. 3d at 907; R. at 18 (Stip. ¶¶ 6, 7, 8, 9). The unexpected, mandated quarantine is similar to the unexpected shutdown of the library due to COVID-19 that kept the plaintiff in *Johnson* from filing on time. 2021 U.S. Dist. LEXIS 173635, at *3; R. at 18 (Stip. ¶ 8). A court would also find that Mr. Pollard's mandated quarantine was beyond the control of either Mr. Hawkins or Mr. Pollard. Unlike the plaintiffs in *Barnes*, Mr. Hawkins can demonstrate how COVID-19 directly caused him to file his claim past the statute of limitations. *See Barnes*, 776 F.3d at 1151; R. at 19 (Stip. ¶ 17). Moreover, while in quarantine, Mr. Pollard did not have proper phone or internet access to reach his client or the administrative agency he was going to use to file the claim. R. at 18 (Stip. ¶ 9). This contrasts with the facts in *DeLia* where the court held that the COVID-19 pandemic did not constitute an extraordinary

circumstance when the administrative processes to submit a claim remained available during the onset of the pandemic. 2021 U.S. App. LEXIS 28311, at *1.

Mr. Hawkins' situation also differs from the plaintiff's situations in *Small*, *Flud,* and *Sigala*. *Small* 10 F.4th at 146 (abandoned by lawyer with five months to find replacement); *Flud*, 23 F. Supp. 3d at 1357 (plaintiff chose not to call lawyer); *Sigala*, 656 F.3d at 1128 (nothing prevented plaintiff from calling lawyer). In Mr. Hawkins' case, he neither knew that his lawyer was quarantined on a ship and was unable to file the claim, nor could he have likely found a new lawyer within the statute of limitations. R. at 18 (Stip. ¶ 6). Furthermore, unlike the plaintiff in *Boland*, Mr. Hawkins did not personally make any decision that delayed filing the claim; it was the sole consequence of Mr. Pollard's mandated quarantine. *Boland*, 827 F. App'x at 337; R. at 19 (Stip. ¶ 17). Mr. Hawkins' situation is most similar to the plaintiff's situation in *Maples* because the mandated quarantine occurred within the last eight days of the statute of limitations making it an extremely critical point in Mr. Hawkins' filing process. *Maples*, 565 U.S. at 270 (plaintiff abandoned at critical time); R. at 18 (Stip. ¶¶ 6,7,8,9).

The ten-day mandated quarantine that forced Mr. Pollard to file Mr. Hawkins' FTCA claim past the statute of limitations was an extraordinary circumstance because it was unforeseeable and beyond the control of both Mr. Hawkins and Mr. Pollard.

Applicant Details

First Name	**Claire**
Last Name	**Smith**
Citizenship Status	**U. S. Citizen**
Email Address	**csmit132@villanova.edu**
Address	**Address** **Street** **1062 E. Lancaster Ave, Apt. 717** **City** **Bryn Mawr** **State/Territory** **Pennsylvania** **Zip** **19010** **Country** **United States**
Contact Phone Number	**2678858505**

Applicant Education

BA/BS From	**Georgetown University**
Date of BA/BS	**May 2019**
JD/LLB From	**Villanova University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23906&yr=2010**
Date of JD/LLB	**May 18, 2024**
Class Rank	**15%**
Law Review/ Journal	**Yes**
Journal(s)	**Villanova Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Smith, Judy
Judy.Smith@usdoj.gov
215 861 8511
Chanenson, Steve
chanenson@law.villanova.edu
Samahon, Tuan
victoria.durand@law.villanova.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Claire M. L. Smith
1062 E. Lancaster Ave, Apt. 717
Bryn Mawr, PA 19010
267-885-8505• csmit132@law.villanova.edu
https://www.linkedin.com/in/claire-smith-71809012b/

June 12, 2023

The Honorable Chief Judge Juan R. Sanchez
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Chief Judge Sanchez,

I am a rising third-year student at the Villanova University Charles Widger School of Law and am writing to you to apply for a 2024-25 clerkship in your chambers. I am a Bucks County native and plan to practice in Philadelphia, building upon the relationships I made here upon completion of the clerkship. I am particularly interested in clerking for you because of your experience as a public defender in Chester County, and I am interested in pursuing a career in criminal law following graduation and a clerkship. I also appreciate your commitment to increasing diversity in the courts through the Jury Diversity Subcommittee to reflect the district.

I have a broad background that has prepared me for a career in litigation. At Villanova, I am enrolled in the Litigation and Dispute Resolution Concentration. I have legal research and writing skills from my time on the Villanova Law Review and as a research assistant studying the Consumer Product Safety Commission. I recently served as an extern with the United States Attorney's Office in the Eastern District of Pennsylvania, where I drafted a motion to dismiss for failure to state a claim in a Federal Tort Claims Act action. In summer 2022, I was a judicial intern for the Honorable Michael M. Baylson, where I drafted an opinion on a motion for summary judgment for an employment discrimination case. I also drafted internal memoranda on Telephone Consumer Protection Act claims and sanctions under Rules 11 and 16(f) of the Federal Rules of Civil Procedure. This summer, I am a summer associate with Bennett, Bricklin & Saltzburg, where I am working on numerous civil litigation matters, including insurance defense and special investigations and fraud.

Before Villanova, I worked in grant administration for the University of Southern California and drafted grant proposals on a tight time frame. I held several internships with the U.S. House of Representatives and the U.S. Senate and drafted a bill on graduate medical education and prepared memoranda on transportation and health care, sparking my passion for public service.

I have attached, for your review, my resume, law school transcript, and a motion for summary judgment I wrote for Judge Baylson. Letters of recommendation from Professor Tuan Samahon (samahon@law.villanova.edu; 610-519-7088), Professor Steven Chanenson (chanenson@law.villanova.edu; 610-519-7459), and Assistant U.S. Attorney Judy Smith (Judy.Smith@usdoj.gov) will be sent separately. Thank you for your consideration. I look forward to hearing from you.

Respectfully,

Claire M. L. Smith

Claire Smith

1062 E. Lancaster Ave, Apt. 717
Bryn Mawr, PA 19010
267-885-8505 ● csmit132@law.villanova.edu
https://www.linkedin.com/in/claire-smith-71809012b/

EDUCATION

Villanova University Charles Widger School of Law, Villanova, PA
JD Candidate, anticipated May 2024, GPA: 3.60; Rank: 28/209
Honors: Dean's Merit Scholarship, Litigation Concentration
Activities: Online Editor, *Villanova Law Review*, Vol. 69; Health Law Society, Teaching Assistant, Civil Procedure; Research Assistant, Professor Benjamin Cavataro

Georgetown University, Washington, DC
BA in Government, minor in Theatre, May 2019; GPA: 3.57
Honors: Dean's List (Five semesters)
Activities: Philodemic Society, Mask and Bauble Dramatic Society, Student Senator

EXPERIENCE

Bennett, Bricklin & Saltzburg, Philadelphia, PA
Summer Associate, June 2023-August 2023
- Research medical records, prepare memoranda in insurance matters and attend civil proceedings.

United States Attorney's Office, Philadelphia, PA
Legal Intern, January 2023-April 2023
- Drafted a motion to dismiss and corresponding brief in Federal Tort Claims Act case.
- Performed legal research on multiple topics such as health care fraud, cyber crime, and immigration.

U.S. District Court for the Eastern District of Pennsylvania, Philadelphia, PA
Judicial Extern, Chambers of Judge Michael M. Baylson, June 2022-July 2022
- Drafted a summary judgment opinion on an Age Discrimination in Employment Act case.
- Attended hearings and take notes for criminal and civil court proceedings.
- Completed extensive legal research and internal memoranda on FRCP sanctions.

Zajac and Arias, Philadelphia, PA
Legal Intern, May 2022-June 2022
- Drafted a complaint for a slip-and-fall case and compiled interrogatories for medical malpractice cases.
- Attended and summarized depositions for clarity and concision.

University of Southern California, Washington, DC
Project Specialist, Office of Research Advancement, June 2019-July 2021
- Drafted letters of support for projects for USC and Children's Hospital Los Angeles
- Advised academics on a wide variety of subject areas on the pre-award grant process

U.S. House of Representatives, Washington, DC
Legislative Intern, Office of the Majority Leader, August 2018-December 2018
- Researched health care policy and assisted in drafting a bill on graduate medical education reform

United States Senate, Washington, DC
Legislative Intern, Senator Patrick Toomey (R-PA), January 2018-May 2018
- Studied multiple policy areas, led Capitol tours, and drafted memorandum on transportation policy

Ridge Policy Group, Washington, DC
Research Intern, August 2017-December 2017
- Researched legislation and attended and monitored relevant Congressional hearings

LANGUAGE SKILLS & VOLUNTEER

- French (professional working proficiency), Spanish (basic proficiency)
- Legal research on LexisNexis and Westlaw
- Volunteer, Junior League of Philadelphia

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CHARLES WIDGER SCHOOL OF LAW

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Record of: Claire M Smith
3820 South Mallard Lane
Doylestown, PA 18902-6211

Issued To: CLAIRE SMITH
CSMIT132@LAW.VILLANOVA.EDU
Course Level: Law School

INSTITUTION CREDIT:

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Fall 2021						
Law						
LAW	0110	Civil Procedure	4.00	A	16.00	
LAW	0150	Criminal Law	4.00	A	16.00	
LAW	0155	Torts	4.00	C+	9.32	
LAW	0156	Legal Analysis, Rsch & Wrtg H	2.50	B+	8.32	
LAW	0157	Professional Development	0.50	P	0.00	

	ERN	GPAH	QPTS	GPA	RANK/	CLS
CURR	15.00	14.50	49.65	3.42		
CUM :	15.00	14.50	49.64	3.42	57/	216

Winter 2022						
Law						
LAW	7200	Business Aspects of Law	1.00	P	0.00	

	ERN	GPAH	QPTS	GPA	RANK/	CLS
CURR	1.00	0.00	0.00	0.00		
CUM :	16.00	14.50	49.64	3.42		

Spring 2022						
Law						
LAW	0120	Contracts	4.00	B+	13.32	
LAW	0153	Property	4.00	A-	14.68	
LAW	01560	Legal Analysis, Rsch & WrtgIIH	2.50	B+	8.32	
LAW	0157	Professional Development	0.50	P	0.00	
LAW	1000	Constitutional Law I	3.00	B+	9.99	
LAW	7131	Justice and Rights	3.00	A	12.00	

	ERN	GPAH	QPTS	GPA	RANK/	CLS
CURR	17.00	16.50	58.32	3.53	41/	218
ANNL	32.00	31.00	107.96	3.48		
CUM :	33.00	31.00	107.96	3.48	44/	218

Fall 2022						
Law						
LAW	0158	Professional Development II	0.50	P	0.00	
LAW	1007	Legal Writing 3: Litigation	3.00	A-	11.01	
LAW	6015	Journal:Law Review	1.00	P	0.00	
LAW	7004	Criminal Procedur:Adjudication	3.00	A	12.00	
LAW	7024	Evidence	4.00	B	12.00	
LAW	7159	Civ & Crim Health Care Fraud	2.00	A	8.00	

	ERN	GPAH	QPTS	GPA	RANK/	CLS
CURR	13.50	12.00	43.01	3.58	62/	210
CUM :	46.50	43.00	150.97	3.51	43/	210

Winter 2023						
Law						
LAW	7201	Bus and Fin Literacy for Lawye	1.00	P	0.00	

	ERN	GPAH	QPTS	GPA	RANK/	CLS
CURR	1.00	0.00	0.00	0.00		
CUM :	47.50	43.00	150.97	3.51		

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
Spring 2023						
Law						
LAW	0158	Professional Development II	0.50	P	0.00	
LAW	1001	Constitutional Law II	3.00	A	12.00	
LAW	6015	Journal:Law Review	1.00	P	0.00	
LAW	6253	Separation of Powers Seminar	2.00	A	8.00	
LAW	7009	Technology in the Courtroom	1.00	A	4.00	
LAW	7078	Workers' Compensation Law	2.00	A	8.00	
LAW	7136	Criminal Procedure: Invest	2.00	A	8.00	
LAW	8055	Externship:General	3.00	H	0.00	

	ERN	GPAH	QPTS	GPA	RANK/	CLS
CURR	14.50	10.00	40.00	4.00	1/	209
ANNL	28.00	22.00	83.01	3.77	23/	209
CUM :	62.00	53.00	190.97	3.60	28/	209

Fall 2023						
IN PROGRESS WORK						
LAW	0159	Professional Development III	0.50	IN PROGRESS		
LAW	0160	Villanova Law Inn of Court	0.00	IN PROGRESS		
LAW	1002	Legal Profession	3.00	IN PROGRESS		
LAW	5003	Civil Pretrial Practice	2.00	IN PROGRESS		
LAW	6015	Journal:Law Review	1.00	IN PROGRESS		
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICK T. SULLIVAN **v.** **WIDENER UNIVERSITY**	**CIVIL ACTION** **NO. 20-5614**

MEMORANDUM RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Baylson, J. **August 1, 2022**

This civil case arises from Plaintiff Patrick T. Sullivan's employment as Executive Director of Campus Safety at Defendant Widener University. Sullivan alleges violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. ("ADEA") (Count I) and the Pennsylvania Human Relations Act ("PHRA") (Count II). See Compl. (ECF 1) ¶¶ 42-45. Defendant seeks summary judgment on both claims. See Mot. (ECF 12). For the following reasons, Defendant's Motion will be denied.

I. Factual Background[1]

A. Sullivan's Employment History at Widener (1992-2019)

Sullivan first joined Widener in 1992 as the Commander of its Reserve Officer Training Corps. ("ROTC"). Pl.'s Counterstatement ¶ 2. He briefly left Widener in 1995, before returning in 1996 to serve as its Director of Campus Safety, prior to being promoted to Executive Director of Campus Safety in 2016. See id. at ¶ 4. During his time at Widener, Sullivan contends that he "overhauled . . . campus security, drastically improving the safety of its students," id. at ¶ 5, and

[1] Unless otherwise indicated, all facts, taken in the light most favorable to Sullivan, are derived from Widener's Statement of Undisputed Facts (ECF 13) ("Def.'s SUF"), Sullivan's related response and counterstatement (ECF 17) (respectively, "Pl.'s Resp. to Def.'s SUF" and "Pl.'s Counterstatement"), or Widener's response to Sullivan's counterstatement (ECF 19) ("Def.'s Resp. to Counterstatement").

was recognized as a "strong leader due to his knowledge of safety requirements related to compliance issues, his unmatched dedication to his job, and his professionalism when working with others," id. at ¶ 8.

Widener has a significantly different account of Sullivan's employment history. According to Widener, Sullivan did not "join[]," or otherwise become its employee, until his hiring as Director of Campus Safety in 1996. Def.'s Resp. to Counterstatement ¶¶ 2, 4. Widener disputes the extent of Sullivan's involvement in the overhaul of the campus security, see id. at ¶ 5, and, although Widener acknowledges that Sullivan was recognized by one former colleague for "professionalism, dedication, and knowledge of safety requirements," it denies Sullivan's position that he was widely recognized by colleagues for these traits, see id. at ¶ 8.

B. Human Resources Complaints Brought Against Sullivan (June-August 2019)

Any concord between Widener and Sullivan disappeared beginning June 2019. Pl.'s Counterstatement ¶ 9; Def.'s Resp. to Counterstatement ¶ 9.

According to Sullivan, on June 12, 2019, his direct supervisor, Senior Vice President Joseph Baker, informed him that Widener's Human Resources Director, Allison Dougherty, had complained that he was not allowing individuals in his department to take vacation days or retire. Pl.'s Counterstatement ¶ 9. Ten days later, Sullivan learned that additional complaints had been filed, and, on June 30, 2019, Dougherty threatened to report Sullivan and his assistant to the Department of Education for a policy violation. Id. at ¶¶ 11-12. Sullivan maintains that all complaints and accusations against him were "false" and "seemingly made to push him out of his position as Executive Director of Campus Safety." Id. at ¶ 13.

According to Widener, Dougherty told Baker on June 12, 2019 that certain campus safety officers were not allowed to use vacation days. See Def.'s Resp. to Counterstatement ¶ 9. Widener

also contends that Baker notified Sullivan of complaints made by certain campus safety officers, see id. at ¶ 11, and that it received a complaint from Dougherty accusing Sullivan and his assistant of violating policy, id. at ¶ 12. Widener insists Sullivan was never reprimanded, given a written warning, or received a note in his file for any of the complaints or accusations made against him. See id. at ¶¶ 9-12. Additionally, Widener maintains that Baker informed Sullivan that "any false accusation [against Sullivan] 'was utterly ridiculous.'" Id. at ¶¶ 9-12 (citing Ex. B 56:7-24).

C. Notice of Sullivan's Demotion (August 28, 2019)

On August 28, 2019, Baker informed Sullivan that Widener intended to hire a new Executive Director of Campus Safety and would be demoting Sullivan. See Def.'s SUF ¶ 5; Pl.'s Resp. to Def.'s SUF ¶ 5; Pl.'s Counterstatement ¶ 14; Def.'s Resp. to Pl.'s Counterstatement ¶ 14.

According to Sullivan, Baker reasoned that the demotion was because "the university [was] moving in a new direction" and Sullivan was "getting old and . . . cannot work forever." Pl.'s Counterstatement ¶ 15 (quoting Resp. Br. Ex. A, 82:5-13).

Widener disputes that Baker made these statements. See Def.'s Resp. to Counterstatement at ¶ 15. Rather, Widener maintains the decision to demote Sullivan was because it was under "intense pressure both financially as well as operationally" and "needed more of an innovator in that role [of Executive Director]—someone who was more proactive rather than reactive." Id. (citing Mot. Ex. B, 36:9-37:16 ("There were a number of examples that Pat—you know, Pat was very strong in the day-to-day, year-to-year things, and that's why I wanted to keep—I wanted to keep him on. But when it came to being proactive, to planning for future years, to being innovative in identifying both operational as well as expense efficiencies, open to change, they were not his strengths. But what he did was—I mean, was an asset to Widener.")). Widener further contends that Baker told Sullivan during the meeting that his new title would "likely" be Director, instead

of Executive Director," and his salary and benefits would remain the same. Def.'s SUF ¶ 6. Sullivan does not deny that Baker testified of Widener's intent to keep Sullivan's salary and benefits the same, despite his title change, but asserts that neither his salary nor benefits decreased because he retired prior to Widener having an opportunity to do so. See Pl.'s Resp. to Def.'s SUF ¶¶ 6, 11-12.

D. Sullivan's Retirement from Widener (January 31, 2020)

One week after the August 28 meeting, Sullivan verbally informed Baker he planned to retire. See Def.'s SUF ¶ 7; Pl.'s Resp. to Def.'s SUF ¶ 7. During the meeting, Baker told Sullivan that he wished he would stay. See Def.'s SUF ¶ 8 (citing Mot. Ex. A (Sullivan Dep. Tr.) 84:7-85:4 & 86:12-23 ("I wish you'd stay.")). However, according to Sullivan, he felt that his retirement was involuntary, and that he would have continued his employment at Widener if he had not been "forced out." See Pl.'s Resp. to Def.'s SUF ¶¶ 9, 14-16. Sullivan also maintains that "the embarrassment of being replaced was a very difficult situation." See id. at ¶ 9.

Widener insists Sullivan's retirement was voluntary. See Def.'s SUF ¶ 9. According to Widener, Sullivan assisted Baker with drafting his retirement announcement to the community and thanked Baker for throwing him a retirement party. Id. at ¶ 14. Moreover, Widener maintains that, at Sullivan's exit interview, in response to being asked if he would ever return to Widener, Sullivan "chuckled and said sure if they would have me. I was treated very fairly." Def.'s SUF ¶ 16. Sullivan denies that the made these comments, and, as to the retirement letter, he states that he "cooperated" with the letter because it was forced upon him. Pl.'s Resp. to Def.'s SUF ¶ 14.

After postponing his retirement upon Baker's request, Sullivan retired on January 31, 2020. See Def.'s SUF ¶ 9, Pl.'s Resp. to Def.'s SUF ¶ 9-10; Pl.'s Counterstatement ¶ 19; Def.'s Resp. to

Pl.'s Counterstatement ¶ 19. He was replaced by an individual who was decades younger than him. See Pl.'s Counterstatement ¶ 20; Def.'s Resp. to Pl.'s Counterstatement ¶ 20.

II. Procedural History

Sullivan filed the instant action on November 10, 2020, alleging violations of the ADEA (Count I) and PHRA (Count II). See Compl. ¶¶ 42-45. Widener filed an answer on March 15, 2021. See Ans. (ECF 5). Following the close of discovery, Widener moved for summary judgment on March 11, 2022 seeking judgment in its favor on all claims. See Mot. (ECF 12). Sullivan responded on April 11, 2022, see Resp. (ECF 17), and Widener replied on April 18, 2022, see Reply (ECF 18).

On July 13, 2022, the Court held oral argument. The parties significantly disagreed on several fact-related issues, for example:

- Widener argued that Sullivan's constructive discharge claim is based on no more than his subjective views. Widener also asserted that Sullivan never questioned his new responsibilities or the restructuring of the campus safety department, and his demotion never came to fruition because he left prior to it going into effect. Sullivan countered that he was the target of "false" complaints and accusations, and that, if he had remained at Widener, he would have been left in a title-only position with no job responsibilities.
- Although the parties agreed Baker told Sullivan he "wished [Sullivan] would stay," they disputed if this was an isolated remark.
- The parties disagreed whether Baker told Sullivan he was "getting old," and "could not work forever," at the August 28, 2019 meeting. Widener argued that, even if true, it was not enough to support a constructive discharge claim.

- Widener agreed that Sullivan's demotion was in part because he was not strong in being "proactive" and "innovative in identifying both operational as well as expense efficiencies, open to change," or "planning for future years," but argued that such statements, not made to Sullivan, were alone insufficient to support constructive discharge.
- Sullivan agreed with Widener that his salary never changed following the August 28. 2019 meeting, but Sullivan reasoned it was because he remained at Widener for such a short period that it never needed to, or had an opportunity to, change his salary. Widener claimed Sullivan's title did not change because Baker never filed the required form with human resources because Sullivan retired.

Additionally, the parties thoroughly disputed the availability of damages for Sullivan's claims, specifically if Sullivan could recover back pay, front pay, and liquidated damages; if Sullivan could recover nominal damages under the PHRA; and the extent to which Sullivan mitigated damages.

III. Legal Standard

Summary judgment should be granted if the moving party establishes "no genuine dispute as to any material fact, and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P.56(a). A dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Conboy v. SBA, 992 F.3d 153, 160 (3d Cir. 2021). A factual dispute is material if it "might affect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248. Summary judgment is appropriate only if "the record taken as a whole could not lead a rational trier of fact

to find for the non-moving party." Matsushita Elec. Indus. Co., Ltd. v Zenith Radio Corp., 475 U.S. 574, 587 (1986).

In deciding a motion for summary judgment, courts must view the record "in the light most favorable to the nonmovant, drawing reasonable inferences in its favor." In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 396 (3d Cir. 2015). The movant must identify portions of the record that demonstrate the absence of a genuine dispute of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). If the nonmovant carries the burden of proof on an issue at trial, the moving party must show "an absence of evidence to support the nonmoving party's case." Id. at 325. Once the movant meets this burden, the nonmovant must set forth specific facts—through citation to affidavits, depositions, discovery documents, or other evidence—that demonstrate a genuine dispute. See Fed. R. Civ. P. 56(c)(1). The court's role is not "to weigh the evidence and determine the truth of the matter," but "to determine whether there is a genuine issue for trial." Baloga v. Pittston Area Sch. Dist., 927 F.3d 742, 752 (3d Cir. 2019) (quoting Anderson, 477 U.S. at 249).

IV. Discussion

A. Evaluating ADEA Claims at Summary Judgment

The ADEA prohibits employers from "discharg[ing] any individual or otherwise discriminat[ing] against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's age[.]" 29 U.S.C. ¶ 623(a)(1).[2] At summary judgment, if an age discrimination plaintiff relies on circumstantial evidence, courts employ a three-part burden-shifting framework. McDonnell Douglas Corp. v. Green, 411 U.S.

[2] The PHRA is to be interpreted as identical to the ADEA. See Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 567 (3d Cir. 2002).

792, 802-05 (1973); see also Martinez v. UPMC Susquehanna, 986 F.3d 261, 265-66 (3d Cir. 2021). First, the plaintiff must establish a prima facie case of age discrimination. See Martinez, 986 F.3d at 265 (citing Willis v. UPMC Children's Hosp. of Pittsburgh, 808 F.3d 638, 644 (3d Cir. 2015)). To establish a prima facie ADEA case, a plaintiff must show: (1) he is at least forty, (2) he is qualified for the job, (3) he suffered an adverse employment action, and (4) he was replaced by (or passed over in favor of) someone else "who was sufficiently younger so as to support an inference of a discriminatory motive." Id. at 266 (citing Willis, 808 F.3d at 644).

Once the plaintiff establishes a prima facie case, the burden shifts to the defendant to offer a "legitimate, nondiscriminatory explanation for its action." Martinez, 808 F.3d at 265; see Kargbo v. Phila. Corp. for Aging, 16 F. Supp. 3d 512, 522 (E.D. Pa. 2014) (Baylson, J.). The defendant need not "prove" its nondiscriminatory explanation "was the actual reason for the adverse employment action. Willis, 808 F.3d at 644. "Instead, [it] must provide evidence that will allow the factfinder to determine the decision was made for nondiscriminatory reasons." Id.

Once the defendant satisfies its burden, the plaintiff must show the "nondiscriminatory" reasons were pretext for discrimination. Martinez, 986 F.3d at 265 (citing Willis, 808 F.3d at 644). To survive summary judgment, the plaintiff

> must submit evidence which: (1) casts sufficient doubt upon each of the legitimate reasons proffered by the defendant so that a finder could reasonably conclude that each reason was a fabrication; or (2) allows the factfinder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action.

Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994); see also Sterner v. Siemans Med. Sols. USA, Inc., 706 F. App'x 772, 774 (3d Cir. 2017) (NPO) (the non-moving party must show "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate explanation for its actions that a reasonable factfinder could rationally find them

'unworthy of credence,'" and "the plaintiff must present 'evidence with sufficient probative force' . . . to allow the factfinder to 'conclude by a preponderance of the evidence that age was a motivating or determinative factor'") (quoting Fuentes, 32 F.3d at 765 and Willis, 808 F.3d at 645).

B. Constructive Discharge

Widener seeks summary judgment on the theory Sullivan cannot establish a prima facie case because he did not suffer an adverse employment action in the form of a constructive discharge. See Mot. 10-13.

In evaluating constructive discharge claims, the Third Circuit applies an objective test that asks "whether a reasonable jury could find that the [employer] permitted conditions so unpleasant or difficult that a reasonable person would have felt compelled to resign," or retire. Duffy v. Paper Magic Grp., Inc., 265 F.3d 163, 166 (3d Cir. 2001) (quoting Connors v. Chrysler Financial Corp., 160 F.3d 971, 975 (3d Cir. 1998)); see also Pa. State Police v. Suders, 542 U.S. 129, 141 (2004). Lebofsky v. City of Phila., 394 F. App'x. 935, 939 (3d Cir. 2010) (NPO). "[T]hus an employee's subjective perceptions of unfairness or harshness do not govern a claim of constructive discharge." Mandel v. M & Q Packaging Corp., 706 F.3d 157, 169 (3d Cir. 2013) (citing Gray v. York Newspapers, Inc., 957 F.2d 1070, 1083 (3d Cir. 1992)).

Several factors may be relevant to a finding of constructive discharge, to include whether the employee was "threatened with discharge, encouraged to resign, demoted, subject to reduced pay or benefits, involuntarily transferred to a less desirable position, subject to altered job responsibilities, or given unsatisfactory job evaluations." Mandel, 706 F.3d at 169-70 (citing Colwell v. Rite Aid Corp., 602 F.3d 495, 503 (3d Cir. 2010); see Clowes v. Allegheny Valley Hosp., 991 F.2d 1159, 1161-62 (3d Cir. 1993). Additionally, "a reasonable employee will usually

explore . . . alternative avenues [such as requesting a transfer to another position, advising the employer that he felt compelled to resign or retire, or filing a grievance] thoroughly before coming to the conclusion that resignation is the only option." Clowes v. Allegheny Valley Hosp., 991 F.2d 1159, 1161 (3d Cir. 1993). These factors are not an "absolute requirement for recovery," and the absence of any factor is not itself dispositive. Duffy, 265 F.3d at 168. Similarly, although an employee relying on a single discriminatory incident has a difficult road to establish an employer's liability, "the Third Circuit has declined to 'state as a broad proposition of law that a single non-trivial incident of discrimination can never be egregious enough to compel a reasonable person to resign.'" Samuel v. Target Realty, LLC, No. 19-2203, 2021 WL 4778858, at *12 (E.D. Pa. Oct. 13, 2021) (Goldberg, J.) (quoting Levendos v. Stern Ent., 860 F.2d 1227, 1232 (3d Cir. 1988)).

1. Parties' Arguments

Widener argues that there is no evidence to support Sullivan's constructive discharge theory. Widener points to a lack of evidence concerning (1) "general policies" to force Sullivan into retirement; (2) "systemic unlawfulness" in connection with Dougherty's complaints against Sullivan, particularly given that Sullivan was never reprimanded for Dougherty's complaints and Baker testified that her accusation concerning the untimely warnings was "utterly ridiculous"; and (3) not being offered benefits consistent with a voluntary early retirement program. Mot. 11-13. Widener also argues that Baker's so-called comments about Sullivan "getting old" and not being able to work forever, and Widener "going in [a] new direction," alone cannot support constructive discharge. Id. at 13. Additionally, Widener insists that Sullivan voluntarily retired, and was even encouraged him to stay at Widener, which together cannot amount to the type of intolerable conditions supporting liability under a constructive discharge theory. Id. at 13-14.

Sullivan counters that summary judgment would be improper because (1) there is a genuine issue of material fact as to whether Baker's made the "getting old" and "cannot work forever" comments at the August 28, 2019 meeting, see Resp. 14; (2) if Baker did make these comments, they are probative of discrimination, see id. at 15 (citing Ryder v. Westinghouse Elec. Corp., 128 F.3d 128, 133 (3d Cir. 1997); and (3) pretext is a factual issue regarding intent that a factfinder must decide, see id. (citing Jalil v. Avdel Corp., 873 F.2d 701, 707 (3d Cir. 1989). Sullivan also contends that his notice of demotion amounted to an involuntary transfer to a less desirable position with altered job responsibilities and under the supervision of his much younger and less experienced replacement, and he suffered numerous false complaints and accusations prior to August 28, 2019. See id. at 8.

2. Analysis

Genuine disputes of material fact exist to preclude summary judgment as to whether Sullivan suffered an adverse employment action in the form of constructive discharge. Viewing the facts in the light most favorable to Sullivan, as the Court must do at summary judgment, a reasonable jury could conclude that Sullivan felt compelled to retire.

First, in the months prior to the August 28, 2019 meeting, Sullivan was notified that he was the subject of multiple human-resources-related complaints and accusations related to his job performance. See supra Section I(C) (citing Pl.'s Counterstatement ¶¶ 9-12). Sullivan maintains that these complaints and accusations were false, and that he had never received a similar complaint in his over two decades at Widener. See id.; see also Def.'s Resp. to Pl.'s Counterstatement ¶¶ 9-12. Although Baker told Sullivan that at least of one of the accusations was "utterly ridiculous," and Widener stated that Sullivan never received a reprimand, warning, or notation in his file for any of the complaints or accusations, see Def.'s Resp. to Pl.'s Counterstatement ¶¶ 9-12, a dispute remains as to what complaints and accusations were false and